(8)

02-137

No.

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

JOHN LOUIS VISCIOTTI, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

APPENDIX A

[Filed April 24, 2002]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN LOUIS VISCIOTTI,	)	
	)	
Petitioner-Appellee-Cross-Appellant,	)	Nos. 99-99031 99-99032
	)	
v.	)	D.C. No.
	)	CV 97-04591-R
JEANNE WOODFORD, Warden of California State Prison at San Quentin,	)	OPINION
	)	
Respondent-Appellant-Cross-Appellee.	)	
	)	

Appeal from the United States District Court
for the Central District of California
Manuel Real, District Judge, Presiding

Argued and Submitted
December 6, 2001 – Pasadena, California

Filed April 24, 2002

Before: Harry Pregerson, A. Wallace Tashima, and Marsha S. Berzon, Circuit Judges.

Opinion by Judges Pregerson and Tashima;
Dissent by Judge Pregerson

SUMMARY

Criminal Law and Procedure/Right to Counsel

The court of appeals affirmed a judgment of the district court. The court held that in a Sixth Amendment right to counsel case, defense counsel does not abandon his client at a critical stage of his felony murder rule trial, warranting a presumption of prejudice, by conceding in his closing argument that there was no reasonable doubt that the client was guilty of first degree murder, when counsel also argues that: the evidence against his client was not overwhelming; there were factors that could be decided in favor of innocence under the reasonable doubt standard; the murder was not premeditated; his client lacked the specific intent to kill; and his client was not a cold-blooded killer.

Appellant John Visciotti, a California state prisoner, was convicted in California state court of first degree murder, attempted murder, and robbery, and sentenced to death. During his trial, the prosecution had adduced the testimony of the surviving victim, Michael Wolbert, who knew Visciotti from his workplace and unambiguously identified him as the man who had robbed and shot Timothy Dykstra and Wolbert, killing Dykstra. The prosecution had also introduced two videotapes in which Visciotti confessed to his plan and intent to rob the men and his knowing and intentional shooting of them during the course of that robbery. One of the videotapes, referred to by the state court as a "reenactment," featured Visciotti at the scene of the crime admitting to his involvement in the robbery and shootings, describing the chain of events, and even pointing out the locations where the individual events had transpired. Visciotti's counsel, Roger Agajanian had put on a defense mental health expert, made objections, and cross-examined the prosecution's witnesses. Agajanian conceded in his closing

argument that there was no reasonable doubt that Visciotti was guilty of first degree murder. However, Agajanian explicitly argued at closing that the evidence against his client was not overwhelming and that there were factors that could be decided in favor of innocence under the reasonable doubt standard. Agajanian also argued that the murder was not premeditated, that Visciotti lacked the specific intent to kill, and that Visciotti was not a cold-blooded killer.

The California Supreme Court affirmed Visciotti's conviction. Visciotti petitioned for a writ of habeas corpus in the California Supreme Court, claiming that Agajanian provided ineffective assistance of counsel during the penalty phase due to his deficient preparation and performance. The California Supreme Court denied Visciotti's petition, assuming that Agajanian provided constitutionally inadequate representation during the penalty phase, but concluding that these inadequacies did not prejudice the jury's sentencing decision.

Visciotti filed a federal habeas petition and the district court granted Visciotti's habeas petition as to his sentence, finding that Visciotti had been denied effective assistance of counsel during the penalty phase. However, the district court determined that Agajanian's performance during the guilt phase of the trial was not unconstitutionally deficient or prejudicial.

Visciotti appealed the decision to deny habeas relief on his ineffective assistance of counsel claim as to his conviction.

[1] To prevail on a claim of ineffective assistance of counsel, a petitioner must show that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. **[2]** To demonstrate prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

[3] The strength of the prosecution's evidence against Visciotti for first degree murder under the felony murder rule

and for attempted murder made it highly unlikely that even a highly competent performance by Agajanian could have altered the jury's verdict. To convict Visciotti under the felony murder rule, the jurors were not required to find malice or premeditation; the only criminal intent required was the specific intent to commit the robbery. **[4]** The evidence against Visciotti, including Wolbert's testimony about Visciotti's demeanor at the time of the crime and Visciotti's own videotaped recollection of the details of his plans to rob and the subsequent robbery of Wolbert and Dykstra, was substantial and convincing. In light of this strong inculpatory evidence and the weakness of any contrary evidence, even a highly competent performance by Agajanian at the guilt phase would not have affected the verdict.

[5] In Sixth Amendment right to counsel cases, the Supreme Court has presumed prejudice where there are circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. This exception is limited to the complete denial of counsel and

comparable circumstances, including: (1) where a defendant is denied counsel at a critical stage of his trial; (2) where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; (3) where the circumstances are such that the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial; and (4) where counsel labors under an actual conflict of interest. Apart from circumstances of this nature and magnitude, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt.

[6] Although Agajanian's overall performance at the guilt phase of the trial may well have been deficient, the record demonstrated at least some efforts by Agajanian to advocate Visciotti's case during the guilt phase. There was also nothing in the record to indicate that Agajanian had a conflict of interest,

sympathized with the prosecution, was hostile to his client, or wanted him to be convicted. Under these circumstances, it could not be concluded that Agajanian's overall performance at the guilt phase entirely failed to subject the prosecution's case to meaningful adversarial testing, or that Agajanian left Visciotti completely without representation at the guilt phase.

[7] The record also did not support the contention that Agajanian abandoned Visciotti at a critical state of his trial by conceding in his closing argument that there was no reasonable doubt that Visciotti was guilty of first degree murder. Agajanian's closing argument, although it could be criticized as deficient and ineffective, could not properly be characterized as an abandonment of his client, warranting a presumption of prejudice. **[8]** Agajanian explicitly argued at closing that the evidence against his client was not overwhelming and that there were factors that could be decided in favor of innocence under the reasonable doubt standard. **[9]** Agajanian also argued that the murder was not premeditated, that Visciotti lacked the

specific intent to kill, and that Visciotti was not a cold-blooded killer. **[10]** Thus, Agajanian's guilt-phase representation did not make the adversary process itself presumptively unreliable. **[11]** The California Supreme Court's decision that Visciotti failed to make a prima facie case of ineffective assistance of counsel at the guilt phase of the trial was not objectively unreasonable. Because the record did not support a finding of clear error, it had to be concluded that the state court reasonably applied clearly established federal law, as determined by the Supreme Court of the United States; therefore, the district court's denial of Visciotti's claim of ineffective assistance of counsel at the guilt phase of the trial had to be affirmed.

Judge Pregerson dissented, writing that Visciotti's claim of ineffective assistance of counsel during the guilt phase should have been granted because Agajanian's deficient performance during the guilt phase was per se prejudicial.

COUNSEL

John T. Swan, Deputy Attorney General, San Diego, California, for the respondent-appellant-appellee.

William H. Forman and Statia Peakheart, Deputy Federal Public Defenders, Los Angeles, California, for the petitioner-appellee-cross-appellant.

OPINION

PREGERSON, Circuit Judge, authored Sections I, II, and III B, with which Judges Tashima and Berzon concur. TASHIMA, Circuit Judge, authored Section III A, with which Judge Berzon concurs, and from which Judge Pregerson dissents.

John Visciotti ("Visciotti"), a California state prisoner, was convicted of first degree murder, attempted murder, and robbery, and sentenced to death. After exhausting his claims in state court, Visciotti brought a federal habeas petition alleging, among other claims, ineffective assistance by his counsel during the guilt and penalty phases of his trial. The district court granted Visciotti's habeas petition as to his sentence but denied habeas relief as to his conviction. Warden Woodford appealed and Visciotti cross-appealed the district court's decision. We affirm the district court's decision in its entirety.[1]

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1. We review a district court's decision to dismiss a petition for writ of habeas corpus de novo. *Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999).

I.

The following events, as described by the California Supreme Court, led to Visciotti's prosecution and conviction.

> [Visciotti] and Brian Hefner, both of whom had been employed as burglar alarm salesmen by Global Wholesalers in Garden Grove [California], and who shared a motel room, were fired by their employer on November 8, 1982. Because their final paychecks were insufficient to cover future rent, they devised a plan to rob fellow employees who were also to be paid on that date. The pair waited in the company parking lot until another group of employees, among whom were [Timothy] Dykstra and [Michael] Wolbert, returned from their shifts. They invited Dykstra and Wolbert to join them at a party which, they claimed, was to be held at the home of friends in the Anaheim Hills area.
>
> Dykstra and Wolbert agreed to go to the party. They did not know [Visciotti] and Hefner well, however, and were cautious. They insisted on driving in Wolbert's car. They also removed most of their cash from their wallets and hid it behind the dashboard of their car. After leaving [Visciotti's] car at an apartment complex, the four drove to a remote area on Santiago Canyon Road where [Visciotti] asked Wolbert to stop so that defendant could relieve himself. It was then between 7 and 9 p.m.
>
> All four men left the car, Dykstra getting out first to permit [Visciotti] to leave. After the other three men left the car, Wolbert saw a gun in [Visciotti's] waistband. Wolbert then left the car and when he next

> looked at [Visciotti] he saw that [Visciotti] and Dykstra were standing face-to-face about two feet apart, with [Visciotti] holding the gun pointed at Dykstra. [Visciotti] demanded the victims' wallets. Wolbert told [Visciotti] where the money was hidden. Dykstra and Wolbert then stayed on an embankment, several feet apart, while Hefner searched for the money.
>
> [Visciotti] moved to stand by Wolbert, who asked [Visciotti] to let them go, told him to take the car and the money, and assured him that he would not identify him. When Hefner left the car, [Visciotti] moved back toward Dykstra who was sitting down. [Visciotti] then raised the gun in one hand and shot Dykstra from a distance of about three or four feet. . . .
>
> After [Visciotti] shot Dykstra, Wolbert stood up and stepped back. [Visciotti] approached Wolbert, who was backing up, raised the gun in both hands, and shot Wolbert three times . . . .
>
> In spite of his life-threatening wounds, Wolbert did not lose consciousness. He heard defendant and Hefner get into the car and drive back down the road. He was later able to attract the attention of passersby who summoned aid. He identified his assailants as fellow employees at Global Wholesalers. Dykstra was dead when paramedics arrived. Wolbert was transported to the hospital where he underwent surgery. On the following morning, he identified both defendant and Hefner in a photographic lineup, identifying [Visciotti] as the person who had shot him and Dykstra.

> [Visciotti] and Hefner were arrested as they left their motel room about 9 a.m. on the morning after the robbery and murder. The murder weapon, a .22-caliber single action revolver which still held six expended shell cases in the cylinder, was found hidden in a space behind the bathroom sink. [Visciotti] confessed his involvement and, at the request of the investigating officers, participated in a videotaped reenactment of those events that had taken place in Santiago Canyon.
>
> Analysis of a sample of [Visciotti's] blood, taken at approximately noon on November 9, 1982, revealed no alcohol, amphetamines, opiates, barbiturates, or phencyclidine (PCP). Cocaine and benzoylecgonine, a metabolite of cocaine, were present, however.

People v. Visciotti, 2 Cal. 4th 1, 28-30 (1992).

Roger Agajanian ("Agajanian") was retained by Visciotti's father to represent Visciotti during pretrial proceedings, through trial, and on appeal. Agajanian was admitted to the California bar in July 1973. *In re Visciotti*, 14 Cal. 4th 325, 336 (1997). He had never tried a capital case that went to a jury or conducted a penalty phase trial before representing Visciotti, though he had represented clients charged with murder. *Id.* at 336. Agajanian was suspended from the State Bar of California in 1990, 1991,

and 1993, and resigned from the California bar in 1994.[2] *Id.* at 349 n.6.

Trial Proceedings

Visciotti was tried by a jury in July 1983 in the Superior Court of the State of California, County of Orange. During the guilt phase of Visciotti's trial, the surviving victim, Michael Wolbert, testified on behalf of the prosecution. The prosecution additionally introduced as evidence Visciotti's videotaped confession and reenactment.

Dr. Louis Broussard ("Dr. Broussard") testified as a witness for the defense. Dr. Broussard testified that Visciotti "had minimal brain injury of a type associated with impulse disorders and specific learning disorders." *Visciotti*, 2 Cal. 4th at 32. He

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2. In December 1985, while representing Visciotti on appeal, Agajanian was convicted of two counts of criminal contempt in the District of Vermont. *In re Visciotti*, 14 Cal. 4th at 349 n.6. "Evidence was admitted at the [state habeas] evidentiary hearing that during the time he represented [Visciotti], Agajanian did not respond to client communications, failed to make court appearances, did not visit clients in jail or show up in court or other places as promised, and was distracted by a civil suit against a nonlawyer who shared his office." *Id.*

admitted during cross-examination, however, that he had not reviewed Visciotti's videotaped confession and reenactment, and would have conducted additional psychological testing and additional interviews had he had enough time to do so.

Visciotti testified on his own behalf. During Agajanian's direct examination, Visciotti described the night of the crimes consistently with the videotaped confession and reenactment. Agajanian also elicited information from Visciotti about his prior juvenile and misdemeanor offenses. Visciotti also admitted that he had been convicted of assault with a deadly weapon, and described the facts underlying this felony conviction. Visciotti testified that the assault occurred after two men broke down the door to his motel room and one, William Scofield ("Scofield"), cut Visciotti's roommate's throat with a knife, while a third man, armed with a gun, stood at the doorway. Visciotti testified that when the three men fled, Visciotti picked up the knife dropped by Scofield, ran after the men, and stabbed Scofield outside Scofield's motel room.

The prosecution contradicted Visciotti's description of the circumstances of the assault through its cross-examination of Visciotti and through the testimony of a police officer the prosecution called as a rebuttal witness. The prosecution elicited testimony from Visciotti and the police officer that Visciotti had broken into Scofield's room and stabbed both Scofield and Kathy Cusack ("Cusack"), a pregnant woman who was in Scofield's bed at the time.

The jury found Visciotti guilty of murder, attempted murder, and armed robbery, with a special circumstance finding that the murder was committed during the commission of a robbery.[3/]

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3. Under California law, a defendant who is found guilty of first degree murder will be sentenced to death or life imprisonment without the possibility of parole if one or more "special circumstances" are found. Cal. Penal Code § 190.2. The statute includes twenty-two "special circumstances," among them that "[t]he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit" several felonies, including robbery. Cal. Penal Code § 190.2(17).

During the penalty phase of Visciotti's trial, Scofield and Cusack[4] testified for the prosecution in support of its case in aggravation. Scofield's and Cusack's descriptions of the circumstances underlying Visciotti's assault conviction were consistent with that of the police officer who testified during the guilt phase. Agajanian called Visciotti's parents and siblings to testify during the penalty phase. As Agajanian later explained, his mitigation strategy was to elicit sympathy for Visciotti's family "in an attempt to make it more difficult for the jury to decide this family's one stray, its son and brother, should be executed." *In re Visciotti*, 14 Cal. 4th at 347. Visciotti was sentenced to death.

On automatic appeal, the California Supreme Court affirmed Visciotti's conviction, with one justice dissenting. *People v. Visciotti*, 2 Cal. 4th 1 (1992).

Habeas Proceedings

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4. Cusack was called as a rebuttal witness during the penalty phase.

Visciotti filed a petition for a writ of habeas corpus in the California Supreme Court. The California Supreme Court appointed a referee[5] to hold an evidentiary hearing and make findings of fact relating to Visciotti's claim that Agajanian provided ineffective assistance of counsel during the penalty phase. After the referee held the hearing and made findings of fact, and after briefing on the merits, the California Supreme Court denied Visciotti's petition in its entirety, with one justice concurring separately and two justices dissenting. *In re Visciotti*, 14 Cal. 4th 325. The California Supreme Court assumed that Agajanian provided constitutionally inadequate representation during the penalty phase, but concluded that these inadequacies did not prejudice the jury's sentencing decision.

Visciotti, with the assistance of court-appointed counsel, filed a federal habeas petition on June 23, 1998. Judge Real of the United States District Court for the Central District of

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5. The referee was a judge of the Orange County Superior Court. *See In re Visciotti*, 14 Cal. 4th at 329.

California held a three-day hearing on Visciotti's claims (except for Visciotti's claim of ineffective assistance of counsel during the penalty phase, as the state court had already held a hearing on that claim). Following this evidentiary hearing, Judge Real determined that Visciotti had been denied effective assistance of counsel during the penalty phase, and granted Visciotti's habeas petition as to his sentence.[6] Judge Real also determined that Agajanian's performance during the guilt phase of the trial was not unconstitutionally deficient or prejudicial and denied Visciotti's other claims.

The state timely appealed Judge Real's decision to grant habeas relief on Visciotti's ineffective assistance of counsel claim as to Visciotti's sentence. Visciotti cross-appealed Judge Real's decision to deny habeas relief on Visciotti's ineffective assistance of counsel claim as to Visciotti's conviction. Visciotti

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6. *Visciotti v. Calderon*, No. CV 97-4591 R (C.D. Cal. filed Oct. 8, 1999). The district court's opinion will be referred to as: "Dist. Ct."

does not appeal Judge Real's dismissal of Visciotti's other claims.

II. Standard of Review

A federal court may grant a writ of habeas corpus to a state prisoner only if the state court's rulings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or were "based on an unreasonable determination of the facts in light of the evidence presented" in the state courts.[7] 28 U.S.C. § 2254(d). Under the "contrary to" clause, a state court's decision is contrary to federal law if it "failed to apply the correct controlling authority from the Supreme Court." *Shackleford v. Hubbard*, 234 F.3d 1072, 1077 (9th Cir. 2000); *see also Williams v. Taylor*, 529 U.S. 362, 405-

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7. Visciotti's petition is governed by the standards of 28 U.S.C. § 2254 because his habeas petition was filed after the effective date of the Anti-Terrorism and Effective Death Penalty Act, the statute which enacted the current standards governing the granting of the writ of habeas corpus. *See Lockhart v. Terhune*, 250 F.3d 1223, 1228 (9th Cir. 2001).

07 (2000); *LaJoie v. Thompson*, 217 F.3d 663, 667-68 (9th Cir. 2000); *Van Tran v. Lindsey*, 212 F.3d 1143, 1150 (9th Cir. 2000). A state court decision is an "unreasonable application" of Supreme Court law if the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Williams*, 529 U.S. at 407-08. In order to warrant habeas relief, the state court's application of clearly established federal law must be "objectively unreasonable." *Id.* at 409.

III. Discussion

A. Agajanian's Performance During the Guilt Phase

Unlike its lengthy discussion concerning Agajanian's performance at the penalty phase of the trial, the California Supreme Court denied Visciotti's claim of ineffective assistance of counsel at the guilt phase of his trial without providing a reasoned explanation. Instead, the state court simply stated that by issuing an order to show cause that was limited to counsel's penalty phase performance, it had "implicitly concluded" that the

other claims failed to "state a prima facie case." *In re Visciotti*, 14 Cal. 4th at 329 (citing *People v. Miranda*, 44 Cal. 3d 57, 119 n.37 (1987) (noting that the issuance of a limited order to show cause in a habeas case is an implicit determination of petitioner's failure to make a prima facie case on the other claims in his petition); *People v. Bloyd*, 43 Cal. 3d 333, 362-63 (1987) (same)).

On habeas review, when there is no reasoned state court decision to review, we must conduct "an independent review of the record . . . to determine whether the state court clearly erred in its application of controlling federal law." *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000) (citing *Van Tran*, 212 F.3d at 1153). In doing so, because there is no state court decision, we must "focus primarily on Supreme Court cases in deciding whether the state court's resolution of the case constituted an unreasonable application of clearly established federal law." *Fisher v. Roe*, 263 F.3d 906, 914 (9th Cir. 2001). Habeas relief cannot be granted "simply because the California Supreme

Court's disposition of the case was inconsistent with our own precedent." *Id.*

[1] To prevail on a claim of ineffective assistance of counsel, a petitioner must show that: (1) "counsel's performance was deficient; "and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In this case, although it seems likely that Agajanian's performance at the guilt phase of the trial was deficient, we need not resolve that issue because we conclude that Visciotti suffered no prejudice as a result of the alleged deficiencies. *See Mayfield v. Woodford*, 270 F.3d 915, 925 (9th Cir. 2001) (en banc) (citing *Strickland*, 466 U.S. at 697).

[2] To demonstrate prejudice, a defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

[3] The strength of the prosecution's evidence against Visciotti for first degree murder under the felony murder rule and for attempted murder made it highly unlikely that even a highly competent performance by Agajanian could have altered the jury's verdict. To convict Visciotti under the felony murder rule, the jurors were not required to find malice or premeditation; the "only criminal intent required [was] the specific intent to commit the [robbery]." *People v. Dillon*, 34 Cal. 3d 441, 475 (1983) (internal quotation marks and citation omitted).

The prosecution adduced the testimony of the surviving victim, Wolbert, who knew Visciotti from his workplace and unambiguously identified him as the man who had robbed and shot Dykstra and Wolbert, killing Dykstra. The prosecution also introduced two videotapes in which Visciotti confessed to his plan and intent to rob the men and his knowing and intentional shooting of them during the course of that robbery. One of the videotapes, referred to by the state court as a "reenactment," *see In re Visciotti*, 14 Cal. 4th at 355, featured Visciotti at the scene

of the crime admitting to his involvement in the robbery and shootings, describing the chain of events, and even pointing out the locations where the individual events had transpired.

[4] There was only minimal evidence supporting a defense that Visciotti lacked the ability to form the requisite intent for the underlying robbery charge due to his drug use. On the other hand, the evidence against such a claim, including Wolbert's testimony about Visciotti's demeanor at the time of the crime and Visciotti's own videotaped recollection of the details of his and Hefner's plans to rob and their subsequent robbery of Wolbert and Dykstra, was substantial and convincing. In light of this strong inculpatory evidence and the weakness of any contrary evidence, we are confident that even a highly competent performance by Agajanian at the guilt phase would not have affected the verdict.

[5] Visciotti contends, however, that Agajanian's flawed performance at the guilt phase of the trial requires the application of the per se prejudice rule. In Sixth Amendment

right to counsel cases, the Supreme Court has presumed prejudice where there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronic*, 466 U.S. 648, 658 (1984). *Strickland*, *Cronic*, and the cases that follow *Cronic* have made clear that this exception is limited to the "complete denial of counsel" and comparable circumstances, including: (1) where a defendant "is denied counsel at a critical stage of his trial"; (2) where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; (3) where the circumstances are such that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial"; and (4) where "counsel labors under an actual conflict of interest." *Id.* at 659-61, 662 n.31; *see also Smith v. Robbins*, 528 U.S. 259, 764-65 (2000) (noting that there is no presumption of reliability where there has been a complete denial of counsel, where the state has

interfered with counsel's assistance, or where counsel is burdened by a conflict of interest); *Penson v. Ohio*, 488 U.S. 75, 88-89 (1988) (holding that a complete denial of counsel on appeal requires a presumption of prejudice); *Strickland*, 466 U.S. at 692 (noting an assumption of prejudice where there is an "actual or constructive denial of . . . counsel altogether"). Apart from circumstances of this nature and magnitude, "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *Cronic*, 466 U.S. at 659 n.26 (citing *Strickland*, 466 U.S. at 693-96).

[6] As noted above, Agajanian's overall performance at the guilt phase of the trial may well have been deficient. His shortcomings included his insufficient investigation and preparation for trial and the limited range of his defense arguments. The foregoing notwithstanding, the record demonstrates at least some efforts by Agajanian to advocate Visciotti's case during the guilt phase. Agajanian put on a

defense mental health expert, Dr. Louis Broussard, made objections, and cross-examined the prosecution's witnesses. There is also nothing in the record to indicate that Agajanian had a conflict of interest, sympathized with the prosecution, was hostile to his client, or wanted him to be convicted. Under these circumstances, we cannot conclude that Agajanian's overall performance at the guilt phase "entirely failed to subject the prosecution's case to meaningful adversarial testing," *Cronic*, 466 U.S. at 659, or that Agajanian left Visciotti "completely without representation at the guilt phase," *Penson*, 488 U.S. at 88.

[7] The record also does not support the contention that Agajanian abandoned Visciotti "at a critical stage of his trial" by conceding in his closing argument that there was no reasonable doubt that Visciotti was guilty of first degree murder. In *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991), the case on which Visciotti and the dissent rely, this court concluded that the defense attorney's concession during closing arguments that

there was no reasonable doubt that his client had intimidated the victims and robbed the bank was an abandonment of the defense of his client "at a critical stage of his trial" and a breakdown in our adversarial system of justice. Unlike the defense attorney's closing argument in *Swanson*, however, Agajanian's closing argument, although it may be criticized as deficient and ineffective, cannot properly be characterized as an "abandonment" of his client, warranting application of the *Cronic* exception and a presumption of prejudice.

[8] Although a few of Agajanian's statements can be interpreted as a concession of Visciotti's guilt as to the felony murder portion of the charges,[8] unlike *Swanson*, 943 F.2d at

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8. The dissent argues that Agajanian conceded Visciotti's guilt of felony murder twice in his closing argument. Both statements, however, were made in the context of Agajanian's efforts to distinguish felony murder from premeditated murder. Thus, the first statement was nothing more than counsel's statement of the law of felony murder, rather than an admission of what the evidence showed. In his second statement, Agajanian pointed out that even if the jury were to find Visciotti guilty of first degree murder, it must still conclude that the killing was "not premeditated."

1077, Agajanian did not assert that the evidence against his client was overwhelming, did not concede that his arguments failed to rise to the level of "reasonable doubt," and did not urge the jury to entertain no reservations or regrets about reaching a guilty verdict. Instead, Agajanian explicitly argued at closing that the evidence against his client was "not overwhelming" and that there were factors that could be decided "in favor of innocence" under the "reasonable doubt" standard.

[9] Agajanian also argued that the murder was not premeditated and that Visciotti lacked the specific intent to kill. He argued that the murder weapon did not belong to Visciotti; that Visciotti had testified to being "scared," "paranoid," and "spaced out" at the time of the shootings; and that the evidence of planning, including efforts to fool the victims about the defendants' place of residence, suggested that there was no intent to kill. Agajanian also argued that Visciotti was not a cold-blooded killer by emphasizing the role that Visciotti's drug use probably played in the robbery and shootings; noting the fact

that Visciotti claimed he was "loaded," that cocaine was found in his blood, and that there is a close link between crime and drug abuse; contending that Visciotti had shot Wolbert from a greater distance than Wolbert testified to; and pointing out that Visciotti had gotten sick and vomited after the shootings.

One can question Agajanian's closing argument strategy of arguing that the crime was not premeditated and that Visciotti was not a cold-blooded murderer, since the jury could convict Visciotti of first degree murder under the felony murder rule without finding premeditation or a specific intent to kill. It is important to keep in mind, however, the context in which Agajanian was lawyering. This was a death penalty case in which the prosecution was making a strong effort to portray the murder and attempted murder as cold-blooded, premeditated, and execution-like, and virtually no effective defense to the felony murder charge was available for defense counsel to argue. In that context, the focus of Agajanian's closing argument on disproving premeditation and the cold-blooded nature of the

murder cannot fairly be characterized as an abandonment of the client, as a jury might be less likely to impose the death penalty on someone convicted of felony murder, as opposed to someone who set out to commit a premeditated murder.[9]

[10] Thus, Agajanian's closing argument, emphasizing the role of drugs and the evidence that the killings were not premeditated and that the defendant was not cold-blooded, was not an "abandonment" of Visciotti under *Cronic*, however deficient and ineffective it may have been. We thus conclude that Agajanian's guilt-phase representation did not "make the

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9. The dissent argues that we have inappropriately "hypothesized" a strategy on behalf of Agajanian by recognizing his efforts to distinguish felony murder from premeditated murder as a not unreasonable strategy. We note that, after the verdict was returned, Agajanian attempted to ascertain whether the verdict was based on felony murder or premeditated murder. The trial judge, however, did not permit the jury to be polled on that question. Thus, we have simply made a "fair assessment of attorney performance" by considering the circumstances under which Agajanian's challenged conduct took place. *See Strickland*, 466 U.S. at 689 (holding that because of the difficulty of making such a fair assessment, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy'" (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

adversary process itself *presumptively* unreliable." *See Cronic*, 466 U.S. at 659 & n.26 (emphasis added). Visciotti must therefore satisfy the *Strickland* test in order to prevail on his claim of ineffective assistance of counsel at the guilt phase of his trial. *Id.* He has not done so.[10]

[11] Accordingly, we conclude that the California Supreme Court's decision that Visciotti failed to make a prima facie case of ineffective assistance of counsel at the guilt phase of the trial was not "objectively unreasonable." Because the record before us does not support a finding of clear error, we conclude that the state court reasonably applied clearly established federal law, as determined by the Supreme Court of the United States; therefore, we affirm the district court's denial of Visciotti's claim of ineffective assistance of counsel at the guilt phase of the trial.

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10. We note that, while we take *Swanson* into account in applying *Cronic*, *Swanson* does not independently qualify as "clearly established Federal law, as determined by the Supreme Court of the United States," as required by 28 U.S.C. § 2254(d)(1), in order to serve as a ground for issuance of the writ. *See Van Tran*, 212 F.3d at 1149.

B. Agajanian's Performance During the Penalty Phase

Strickland also governs Visciotti's claim that he received ineffective assistance of counsel during the penalty phase. Accordingly, to prevail on his penalty phase ineffective assistance of counsel claim, Visciotti must show that Agajanian's performance was deficient and that his deficient performance prejudiced Visciotti's defense. *Strickland*, 466 U.S. at 687. To establish prejudice, Visciotti bears the burden of showing that "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. A "reasonable probability" is *less than* a preponderance: "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.*

The California Supreme Court's decision was "contrary to" Supreme Court law because it mischaracterized *Strickland's* prejudice standard. Instead of evaluating whether there was a *reasonable probability* that, absent Agajanian's deficient performance, the result of the proceedings would have been different, the California Supreme Court evaluated whether a more favorable result was *probable* absent Agajanian's deficient performance.[11/] The California Supreme Court's evaluation of Visciotti's ineffective assistance of counsel claim at the penalty

11. *See Visciotti*, 14 Cal. 4th at 330 (Visciotti "ha[d] not demonstrated that . . . absent [Agajanian's] failings *it is probable* that a more favorable result would have been reached by the penalty jury") (emphasis supplied); *id.* at 355 ("We cannot conclude that *it is probable* that the jury would have found that the evidence of petitioner's troubled family background itself would have outweighed th[e] aggravating evidence") (emphasis supplied); *id.* at 356 ("Under the circumstances *it is not probable* that the jury would have found evidence that petitioner's childhood was troubled or that he turned to drugs as a means of escape from an unbearable family situation mitigating or sufficiently so that the evidence would have affected the jury determination that the aggravating factors outweighed the mitigating in this case") (emphasis supplied).

phase was, therefore, contrary to Supreme Court law. As the Supreme Court recently explained:

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to [the Supreme Court's] clearly established precedent because [the Court] held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different."

Williams, 529 U.S. at 405-06 (quoting *Strickland*, 466 U.S. at 694).

Visciotti is not entitled to relief, however, unless the California Supreme Court reached an erroneous result that warrants the issuance of a writ. After considering the applicable Supreme Court and Ninth Circuit precedent,[12/] we find that

12. Although "clearly established law" for the purposes of 28 U.S.C. § 2254, is the "holdings, as opposed to the dicta, of th[e] Court's decision as of the time of the relevant state court decision," *Williams*, 529 U.S. at 412, "we still look to our own law for its persuasive authority in applying Supreme Court law," *Van Tran*, 212 F.3d at 1154.

Visciotti suffered from ineffective assistance of counsel during the penalty phase and suffered prejudice as a result because "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688.

1. Agajanian's preparation for and presentation during the penalty phase was deficient.

The California Supreme Court assumed that Agajanian's preparation for and presentation at the penalty phase was deficient because Agajanian:

> (1) failed to investigate and discover mitigating evidence as a result of his ignorance of the types of evidence a jury might consider mitigating; (2) failed to present readily available evidence that would have revealed to the jury the extent to which petitioner was subjected to psychological and physical abuse as a child, the impact the dysfunctional and peripatetic family life had on petitioner's development, and the correlation between these events and petitioner's resort to drugs; (3) failed to prepare, which left him unaware of the scope of the aggravating evidence to be introduced; and (4) delivered an unfocused closing argument, during which he undercut his client's own case by telling the jury that the evidence of petitioner's mental and emotional problems was not mitigating.

In re Visciotti, 14 Cal. 4th at 353. Having reviewed the record, we conclude that Agajanian's performance was deficient for the reasons described by the California Supreme Court, and, in addition, because Agajanian relied on a defense in mitigation that was factually unsupported and that portrayed Visciotti in an inaccurate and unflattering light.

a. Agajanian failed to investigate and discover mitigating evidence about Visciotti.

It is clearly established Supreme Court law that the failure to conduct a reasonable investigation constitutes deficient performance. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. In satisfaction of this duty, Agajanian had an "obligation to conduct a thorough investigation of [Visciotti's] background." *Williams*, 529 U.S. at 396; *see also Mayfield*, 270 F.3d at 927; *Ainsworth v. Woodford*, 268 F.3d 868, 874 (9th Cir. 2001). As we have noted, "'[i]t is imperative that all relevant mitigating information be unearthed for consideration at the capital

sentencing phase.'" *Wallace v. Stewart*, 184 F.3d 1112, 1117 (9th Cir. 1999) (quoting *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999) (brackets in original).

Agajanian's performance during the penalty phase was deficient because he conducted essentially no investigation in search of potentially mitigating evidence about Visciotti. Agajanian did not conduct "any formal one-on-one interviews of witnesses familiar with Visciotti's background." Dist. Ct. at 8. Agajanian did not retrieve or review "any records having to do with John Visciotti's background, medical history, school history, history of drug use, juvenile probation, prior convictions, prior incarcerations, or any other material relevant to Visciotti's history." *In re Visciotti*, 14 Cal. 4th at 347. "Agajanian made virtually no effort prior to trial to determine whether friends, relatives, medical records, or institutional records could provide any additional evidence regarding when Visciotti began using drugs, what prompted him to become involved with drugs, what type of drugs he used, how often he

used drugs, or whether his drug use could be classified as an addiction." Dist. Ct. at 7.

Agajanian's performance during the penalty phase was also deficient because he inadequately developed and presented expert testimony regarding Visciotti's mental health. Two psychiatrists, Dr. Seawright Anderson ("Dr. Anderson") and Dr. Kaushal Sharma ("Dr. Sharma") were appointed by the court to evaluate Visciotti's competence to stand trial and sanity at the time of the offenses, but Agajanian provided neither Dr. Sharma nor Dr. Anderson with the information they needed to provide a competent evaluation. Dist. Ct. at 10-12; *In re Visciotti*, 14 Cal. 4th at 338. Agajanian's failure to provide Drs. Sharma and Anderson with the information they requested was not the product of a tactical decision; he simply failed to do so.

Although Agajanian did have a mental health expert, Dr. Broussard, testify for the defense during the guilt phase, he was retained three days before he testified and was unprepared to provide a reliable conclusion about Visciotti's mental state at the

time of the offenses. At their only meeting regarding this case, which lasted less than one hour, Agajanian and Dr. Broussard "discuss[ed] diminished capacity," but Agajanian did not give Dr. Broussard any records or Visciotti's videotaped confession and reenactment to assist his evaluation. *In re Visciotti*, 14 Cal. 4th at 339. Dr. Broussard's interview and testing of Visciotti took "no more than two and one-half hours" and was performed "two days after the People rested in the guilt phase of the trial." *Id.* at 339-40. Dr. Broussard testified at trial that Visciotti "had minimal brain injury of a type associated with impulse disorders," and "that [Visciotti] was not completely aware of what he was doing during the robbery/murder and could not judge the nature and consequences of his acts at the time." *Visciotti*, 2 Cal. 4th at 32. On cross-examination, however, "Dr. Broussard admitted to the jury that, in order to arrive at a reliable conclusion, he needed more time and should have met with Visciotti more than once." Dist. Ct. at 15. During the state

habeas hearing, Agajanian acknowledged that he should have hired Dr. Broussard earlier.

In addition, Agajanian did not heed recommendations from both Dr. Anderson and Dr. Broussard that Agajanian should arrange for additional psychological testing and evaluation of Visciotti. In his report, Dr. Anderson wrote that Visciotti had repeatedly suffered head injuries, including one that resulted in a brief coma, and had been placed on anti-psychotic medications. Dr. Anderson concluded that Visciotti might have organic brain damage, and recommended that additional tests be performed to "rule out the possibility of organic brain disorder" and to "obtain more information about petitioner's basic personality structure." *Id.* Dr. Broussard also encouraged Agajanian to retain a licensed clinical social worker to conduct an extensive evaluation of Visciotti's social history. *In re Visciotti*, 14 Cal. 4th at 340. Dr. Broussard advised Agajanian that Visciotti's case "was a very serious case and would require comprehensive investigation and that the cost of the investigations would be approximately

$2,500." *Id.* Agajanian told Dr. Broussard that he "was not willing to take the time for or to pay for" additional investigation, even though he later stated that he believed that "a court would find that [Visciotti] did not have sufficient resources to hire either counsel or expert witnesses or investigators" and would "very likely" declare Visciotti indigent as a matter of law. Dist. Ct. at 5. Agajanian's failure to develop and present testimony regarding Visciotti's mental health amounts to constitutionally deficient performance. *See, e.g., Turner v. Duncan*, 158 F.3d 449, 456 (9th Cir. 1998) ("failure to arrange a psychiatric examination or utilize available psychiatric information . . . falls below acceptable performance standards"); *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995) (failure to investigate defendant's mental condition as a mitigating factor after being notified that defendant may be mentally impaired constitutes ineffective assistance of counsel).

b. Agajanian failed to present readily available mitigating evidence about Visciotti's background.

As a result of his failure to investigate Visciotti's background, Agajanian did not uncover or present evidence during the penalty phase that was later described at Visciotti's state habeas proceeding as "overwhelming mitigating circumstances" in "an absolutely horrendous family history." *In re Visciotti*, 14 Cal. 4th at 341. Extensive mitigating evidence was presented at Visciotti's state habeas hearing by Shirley Reece ("Professor Reece"), a licensed clinical social worker and professor at the University of California at San Francisco, and Dr. Jay Jackman ("Dr. Jackman"), an expert in forensic psychiatry with experience in substance abuse cases. Both Professor Reece and Dr. Jackman spoke with family members and reviewed Visciotti's "hospital, school, probation, Youth Authority and Department of Corrections records . . . all of which were available and could have been discovered by Agajanian with reasonable investigation." *Id.* at 342. The mitigating evidence Professor Reece and Dr. Jackman uncovered - regarding Visciotti's family life, educational history, history of

drug use, conduct while incarcerated, and possible brain damage - should have been presented to the jury in Visciotti's penalty phase proceeding.

Visciotti's parents' relationship was "extremely volatile, hostile, and mutually abusive, both physically and verbally." *Id.* at 341. Visciotti and his siblings "were always frightened and worried that the parents would kill each other." *Id*. "The battles between petitioner's parents involved screaming that could be heard more than a block away." *Id.* at 343. Visciotti's father held a gun to his mother's head and threatened to kill her in front of Visciotti and his two brothers. Visciotti's mother threw pots of hot coffee and other objects at his father. Visciotti and his siblings "lived a life of terror." *Id.* at 341.

All of the children were "blamed for the family's difficulties, and some were beaten with a belt and slapped." *Id.* Visciotti's parents were particularly relentless in their abuse of Visciotti. *Id.* at 342. Part of this abuse was related to the fact that Visciotti was born with club feet, a congenital abnormality.

Because of his condition, Visciotti could not walk until he was three years old and had to wear splints and special shoes thereafter. *Id.* The treatments for Visciotti's condition strained the family financially and required Visciotti's father to borrow money from his parents, which "impacted on [Visciotti's] father's self image." *Id.* Visciotti's father threatened to break Visciotti's legs, "saying he had paid to have the legs fixed and would break them again." *Id.* Visciotti's siblings testified at the state habeas hearing that Visciotti's father "continually berated" Visciotti, and his parents called him "an 'asshole,' a 'mother fucker,' 'stupid,' and 'retarded.'" *Id.* at 341.

Visciotti's education suffered as a result of his family situation. "Economic problems and the number of children caused the family to move often which had a profound effect on the children. [Visciotti] left kindergarten after nine days and was not re-enrolled in school for the first grade for two years." *Id.* Visciotti's family moved at least twenty times when Visciotti was growing up, and the constant moves "impacted [Visciotti's]

ability to function in school and in his social world. He was always an outsider." *Id.* at 343.

Visciotti's family situation also took a toll on his self-perception. Visciotti "thought he could never do anything right and could never do anything to please his parents. He was highly self-critical and blamed himself for things for which he had no responsibility such as his parents' difficulties." *Id.* at 341.

By the time he turned eight, Visciotti used drugs to escape his family situation. *Id.* at 343. Visciotti first used marijuana, then began using alcohol and Seconal, a sedative hypnotic, and then amphetamines. *Id.* at 343-44. At fifteen, Visciotti began using cocaine, which became his "drug of choice" by age eighteen. *Id.* at 344. Visciotti also began using PCP. *Id.* "Most of the criminal conduct in which [Visciotti] engaged occurred during a period when he had progressed to injecting PCP intravenously several times a day in order to have that detached experience." *Id.* Dr. Jackman testified that "[Visciotti's]

criminal behavior was directly related to his drug use," and that Visciotti did not have a "criminal or antisocial personality." *Id.*

Visciotti was tested for a brain abnormality while at the California Youth Authority because he did not seem to be a "typical delinquent." *Id.* at 343. An abnormal electroencephalogram reflected a possible seizure disorder. *Id.* Visciotti was prescribed Dilantin, an anti-seizure medication, and "[w]hile taking the medication [he] did not abuse drugs and his behavior was significantly improved." *Id.* Dr. Jackman testified that, throughout his time at the California Youth Authority, Visciotti "was not a behavior problem and did all jobs expected of him." *Id.*

Agajanian's failure to investigate and present any of this evidence was not the product of a reasoned tactical decision. Agajanian asserted that, after reviewing Visciotti's videotaped confession and reenactment, he concluded that he would not conduct the investigation necessary to pursue a "sympathy defense" based upon Visciotti's upbringing because he did not

think that any jury could feel sympathy for Visciotti. As Agajanian explained:

> The bottom line is I could not imagine, no matter how terrible his childhood could have been, I could not imagine why a jury would care even a little bit about what happened to a person when he was born or what happened to a person when he was in school or whether he got to play little league or not or whether his father was physically abusive or mentally abusive to him or whether his mother was physically or mentally abusive.

Agajanian's decision not to pursue a sympathy defense based on Visciotti's background cannot be viewed as strategic because it was entirely unfounded. As Agajanian acknowledged, he "chose not to pursue a sympathy defense on behalf of John Visciotti individually . . . without knowing what [he] might find if [he] did." Indeed, Agajanian shielded himself from information that might prove his strategy wrong. Agajanian specifically told Dr. Broussard that he "did not want an opinion on childhood abuse in the report or for Dr. Broussard to indicate that there was any problem in the family, no matter how important information about the family was." *Id.* at 340.

Agajanian's failure to conduct even a preliminary review of Visciotti's background in order to determine what mitigating evidence might exist is unjustifiable.

Moreover, Agajanian's conclusion that information about Visciotti's background could not mitigate Visciotti's punishment is unreasonable. As the Supreme Court has recognized, "'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). Agajanian's decision not to seek any mitigating evidence because of the seriousness of Visciotti's crime reflects that Agajanian "did not understand how evidence of a person's background could be used to call for a sentence less

than death when the crime was a serious homicide." Dist. Ct. at 49.

In sum, Agajanian was ineffective during the penalty phase because he did not "fulfill [his] obligation to conduct a thorough investigation of [Visciotti's] background," and failed to introduce the "voluminous amount of evidence that did speak in [Visciotti's] favor." *Williams*, 529 U.S. at 396.

c. Agajanian relied on a strategy in mitigation that was factually unsupported and that portrayed Visciotti in an inaccurate and unflattering light.

Instead of investigating and presenting the wealth of available mitigating evidence about Visciotti's upbringing and history, Agajanian decided, after viewing Visciotti's videotaped confession, that his strategy during the mitigation phase would be to evoke sympathy for the Visciotti family. Agajanian pursued this "family sympathy" mitigation strategy because "[h]e believed that, although sympathy for petitioner could not be expected, sympathy for petitioner's parents might be" and "[h]is defense would therefore suggest that the parents were nice

people whose son should not be killed." *In re Visciotti*, 14 Cal. 4th at 336.

Agajanian's family sympathy mitigation strategy had little factual support. At the time Agajanian decided to pursue the family sympathy strategy, Agajanian had not "conduct[ed] formal interviews with any members of petitioner's family," he had done "no investigation . . . to seek potentially mitigating evidence," and he had "no information about petitioner's background other than what appeared to him to be 'good aspect's of the family." *Id.* at 337.

Agajanian's family sympathy mitigation strategy was inconsistent with the little that Agajanian found out about the Visciotti family. When Agajanian decided that he would pursue a family sympathy strategy, he was aware that there was "some brutality in the family" and some "possible family discord" during Visciotti's youth. *Id.* He decided not to investigate these allegations, however, because, Agajanian declared, he "was not interested in making [Visciotti's] father or mother or brothers or

sisters out to be monsters because they had sat through the entire trial and supported him throughout the trial." Agajanian's decision that it was more important to preserve the Visciotti family's pride or dignity than it was to prevent his client from receiving the death penalty cannot be viewed as a reasonable basis to forego investigation. As the California Supreme Court "assume[d] arguendo," "since Agajanian apparently was put on notice of possible family discord during petitioner's youth, his decision to present a 'family sympathy' defense without investigation to determine the nature of the evidence that was available was not a decision that a competent attorney representing a capital defendant would make." *Id.* at 348.

As a result of his mitigation strategy, Agajanian portrayed Visciotti in an unflattering light that Agajanian knew to be inaccurate. Agajanian portrayed Visciotti as his family's only "bad seed," while knowing that Visciotti's brother had been arrested for drunk driving and Visciotti's sister had been arrested for possession of methamphetamine. Dist. Ct. at 7. Indeed,

during Visciotti's state habeas hearing, members of Visciotti's family confirmed that, "contrary to the evidence offered at the penalty phase, [Visciotti] was not the only 'bad seed' in an otherwise loving family." *In re Visciotti*, 14 Cal. 4th at 345.

The Supreme Court has instructed that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. Agajanian's mitigation strategy was deficient because it was not the product of a reasonable investigation. Particularly in light of the extensive evidence of Visciotti's physical and mental abuse by his parents, Agajanian's portrayal of Visciotti as the one bad seed in the Visciotti family cannot be considered a reasonable penalty phase strategy.

d. Agajanian was unprepared to respond to the prosecution's aggravating evidence.

Agajanian's performance during the penalty phase was also deficient because he did not investigate and was not prepared to respond to the prosecution's case in aggravation. Five months

before trial began, the prosecutor filed a notice that he intended to introduce, as evidence in aggravation, evidence related to the instant offense and Visciotti's prior conviction for assault with a deadly weapon. Dist. Ct. at 9. Despite this notice, and "[a]lthough it was the practice of the district attorney at the time of the Visciotti trial to make the case files of prosecutors available to defense counsel . . . Agajanian did not send for the police report or go through the prosecutor's file to read it in advance of trial." *In re Visciotti*, 14 Cal. 4th at 340. Agajanian's failure to investigate the assault in preparation for the penalty phase – *after learning the details of the assault during the prosecution's rebuttal in the guilt phase* – is even less defensible as a strategic decision. Agajanian explained that he did not investigate the assault in preparation for the penalty phase because Cusack was an extremely sympathetic victim. Although Agajanian's reasoning might have explained his decision not to pursue a certain line of questioning at trial, it does not justify his failure to investigate the circumstances of the assault.

Agajanian also failed to investigate or introduce any evidence during the penalty phase to mitigate the circumstances of the capital offense. Agajanian did not interview Wolbert, the surviving victim, or Hefner, Visciotti's co-perpetrator, nor did he review the transcript of Hefner's trial. Agajanian also failed to introduce – beyond that introduced at the guilt phase – mitigating evidence regarding the circumstances of the offense: that the gun used to shoot Dykstra and Wolbert belonged to Hefner, that Visciotti did not plan to shoot Wolbert or Dykstra, that Visciotti shot Dkystra only after Hefner gave Visciotti the gun and repeatedly encouraged him to shoot, and that Visciotti had injected himself with cocaine a few hours before the robbery and murder occurred. Dist. Ct. at 28. Agajanian has not offered a reasonable explanation for his failure to conduct this minimal investigation or marshal the available mitigating evidence regarding the circumstances of the capital offense.

Agajanian's failure to investigate Visciotti's prior felony assault conviction and his failure to investigate and present

mitigating evidence regarding the circumstances of the capital offense cannot be justified as strategic decisions. *See, e.g., Turner*, 158 F.3d at 456 (attorney's failure to investigate the prosecution's case "falls below minimum standards of competent representation").

e. Agajanian undercut Visciotti's case during closing argument.

Agajanian "delivered an unfocused closing argument, during which he undercut his client's case by telling the jury that the evidence of petitioner's mental and emotional problems was not mitigating." *In re Visciotti*, 14 Cal. 4th at 353. As the district court found, Agajanian "conceded that nine of the eleven statutory sentencing factors in California Penal Code § 190.3 favored the prosecution without even mentioning the existence of evidence that would support a mitigating interpretation of several of those factors."[13] Dist. Ct. at 27.

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13. Among the eleven factors a jury is instructed to consider when deciding whether to impose life imprisonment or death are: (a) "*[t]he circumstances of the crime* of which the defendant was convicted in the present proceeding"; . . . (d) "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance"; . . . (g) "*[w]hether or not defendant acted under extreme duress or under the substantial domination of another person*"; (h) "*[w]hether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication*"; (i) "*[t]he age of the defendant* at the time of the offense"; (j) "*[w]hether or not the defendant was an accomplice to the offense* and his participation in the offense was relatively minor; (k) "*[a]ny other circumstance* which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Cal. Penal Code § 190.3 (emphases supplied).

In his closing argument, Agajanian told the jury that there was no mitigating evidence related to factor (a), the circumstances of the crime, because "there's no way to make light of any kind of murder, whether or not there's a robbery involved." Agajanian also told the jury that there was no mitigating evidence related to factors (g) and (j), as there was "no evidence" of "extreme duress," apparently referring to the jury's ability to consider whether Visciotti was acting "under the substantial domination of another," and no evidence that Visciotti was an accomplice because Visciotti was, "as the

People said, the trigger man." These three concessions were contrary to evidence that the gun used to shoot Dykstra and Wolbert belonged to Hefner, that Visciotti did not plan to shoot Wolbert or Dykstra, that Visciotti shot Dkystra only after Hefner gave Visciotti the gun and repeatedly encouraged him to shoot, and that Visciotti had injected himself with cocaine a few hours before the robbery and murder occurred. Dist. Ct. at 28.

Agajanian also discounted the effect of mitigating evidence that was submitted during the guilt and penalty phases of Visciotti's trial. Agajanian told the jury that there was no evidence of factor (d), that "the offense was committed while the defendant was under the influence of extreme mental emotional disturbance." Agajanian said: "with respect to emotional disturbance, there's no evidence of that. That isn't even a factor to be considered." Agajanian also told the jury that they could disregard factor (h), which concerned whether Visciotti's capacity to appreciate the wrongfulness of his conduct "was

impaired as a result of mental disease or defect or . . . intoxication" because:

> when you ladies and gentlemen returned this verdict of first degree murder and found special circumstances, you indicated to all of us that you did not find diminished capacity. So if you did not find diminished capacity, how can I argue that as a factor of aggravation or mitigation? It just does not apply. It's not there. I think when you ladies and gentlemen found that - you basically found that diminished capacity did not reduce the nature of the robbery to something less than a robbery, or the nature of the first degree murder to something less than first degree murder. So that's not a factor of mitigation.

Dist. Ct. at 29.

Agajanian conceded the inapplicability of factors (d) and (h) despite evidence submitted at the guilt phase that Visciotti was intoxicated at the time of the offense and that Visciotti suffered from a minimal brain injury that caused an impulse and learning disorder. Dist. Ct. at 30. Agajanian's concessions reflect his failure to recognize that the jury could consider Agajanian's intoxication and brain damage during the penalty phase, even if the evidence was insufficient to establish a legal defense in the guilt phase. *In re Visciotti*, 14 Cal. 4th at 354 n.7.

See also Hendricks, 70 F.3d at 1043 ("[e]vidence of mental problems may be offered to show mitigating factors in the penalty phase, even though it is insufficient to establish a legal defense to conviction in the guilt phase") (citing Cal. Penal Code § 190.3(d),(h)).

Although Agajanian did not concede outright the inapplicability of two of the mitigating factors – "age" and "sympathy" – he hardly advocated for a sentence less than death on account of those factors. Regarding Visciotti's age, Agajanian said: "The age of the defendant. I happen to consider 26 years of age a rather young age." Regarding sympathy, Agajanian said that it "should be an issue to consider." As the District Court observed, however, "Mr. Agajanian did not argue that factor (k) was 'resent' or that it 'favored the defense.' . . . Indeed, he did not identify any evidence that would warrant sympathy for Visciotti (or his family) and, if so, why the jurors should rely on such pity or sympathy as a basis for returning a sentence other than death." Dist. Ct. at 83.

Agajanian's failure to investigate and present extensive mitigating evidence about Visciotti's background was unreasonable, his decision not to pursue a mitigation strategy based on Visciotti's background was uninformed, and his failure to develop and present expert testimony regarding Visciotti's mental health was unjustified. The mitigation strategy Agajanian did pursue, based on sympathy for Visciotti's family, presented Visciotti in an unflattering light that Agajanian knew to be inaccurate. Agajanian was utterly unprepared to respond to the prosecution's case in aggravation. In his closing argument, Agajanian affirmatively conceded several mitigating factors that a reasonable juror might well have applied to the facts, while offering the jury no other reason not to impose the death penalty. In sum, Agajanian's performance throughout the penalty phase was deficient.

2. Visciotti was prejudiced by Agajanian's deficient performance during the penalty phase.

In addition to showing Agajanian's deficient performance, Visciotti must show prejudice: that there is a "reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings." *Id.* We must affirm the district court's reversal of Visciotti's death sentence if we "cannot conclude with confidence that the jury would unanimously have sentenced him to death if [Agajanian] had presented and explained all of the available mitigating evidence." *Mayfield*, 270 F.3d at 929.

We conclude that, in light of the abundant mitigating evidence that Agajanian failed to introduce, Agajanian's inaccurate portrayal of Visciotti as the one "bad seed" in his family, Agajanian's absolute failure to counter the prosecution's case in aggravation, and, perhaps most importantly as to prejudice, Agajanian's closing argument, which conceded several potential mitigating factors while providing the jurors essentially no reason not to impose the death penalty, there is a "reasonable probability that the omitted evidence would have

changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." *Strickland*, 466 U.S. at 700. *See also, e.g.*, *Williams*, 526 U.S. at 398; *Karis v. Calderon*, 283 F.3d 1117, 1140 (9th Cir. 2002); *Mayfield*, 270 F.3d at 933; *Hendricks*, 70 F.3d at 1045.

As noted, the California Supreme Court did not apply the "reasonable probability" standard, so its decision as to prejudice was contrary to clearly established Supreme Court law. Even if the California Supreme Court had correctly applied the prejudice prong of the *Strickland* standard, however, its conclusion that Visciotti suffered no prejudice as a result of Agajanian's deficiencies would be objectively unreasonable, because it "failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – in reweighing it against the evidence in aggravation." *Williams*, 529 U.S. at 398 (citation omitted). The California Supreme Court concluded that Agajanian's

failure to introduce additional evidence about Visciotti's "troubled family background" was not prejudicial because it would not have outweighed the aggravating evidence of "[t]he circumstances of the crime" and "the earlier knifing of William Scofield and the pregnant Kathy Cusack." *In re Visciotti*, 14 Cal. 4th at 355. The California Supreme Court did not, however, take into account the totality of the available mitigating evidence, and completely ignored the mitigating effect of Visciotti's brain damage or adjustment to incarceration. The California Supreme Court also failed to consider the prejudicial impact of: (1) Agajanian's portrayal of Visciotti as the one "bad seed" in the Visciotti family; and (2) Agajanian's multiple concessions during closing argument. Because the California Supreme Court failed to consider the potential impact of all of the mitigating evidence that was available to Agajanian, and failed to consider the prejudicial impact of Agajanian's representation – particularly his closing argument, which was more effective in persuading the jury to impose the death penalty

than it was in convincing them to spare his life – its application of Supreme Court law was objectively unreasonable.

The state argues that the California Supreme Court's conclusion that no prejudice resulted was objectively reasonable because the aggravating evidence was overwhelming. The record reflects, however, that the aggravating factors were not overwhelming, as the jury deliberated a full day and then requested additional guidance on the definitions of "moral justification" and "extreme duress." *Cf. Bean v. Calderon*, 163 F.3d 1073, 1081 (1998) (the fact that the jury was initially divided over the appropriateness of the death penalty, despite the attorney's failure to present mitigating evidence, "undermine[s] confidence in the outcome" of the petitioner's penalty phase hearing). The fact that the jury struggled despite Agajanian's deficient performance reflects a reasonable probability that they would have returned a life verdict had they had the opportunity to hear and consider the available mitigating evidence, had Visciotti not been inaccurately portrayed as the one "bad seed"

in the Visciotti family, and had Agajanian not advised the jury in his closing argument against considering mitigating factors that could have outweighed the aggravating factors.

Accordingly, having reviewed the applicable federal precedents, we conclude that Visciotti received ineffective assistance of counsel during the penalty phase and that he was prejudiced as a result. The California Supreme Court's conclusion that Visciotti did not suffer prejudice as a result of Agajanian's deficient performance during the penalty phase is both contrary to clearly established Supreme Court law and is objectively unreasonable.

CONCLUSION

For the foregoing reasons, we affirm the district court's decision to deny habeas relief on Visciotti's ineffective assistance of counsel claim during the guilt phase and affirm the district court's decision to grant habeas relief on Visciotti's ineffective assistance of counsel claim during the penalty phase.

We remand to the district court with directions to issue the writ of habeas corpus vacating the sentence of death, and conditionally requiring the imposition of a sentence of life imprisonment without the possibility of parole, unless the state grants Visciotti a new penalty phase trial within a reasonable period of time to be set by the district court.

AFFIRMED and REMANDED.

PREGERSON, Circuit Judge, dissenting:

The majority denies Visciotti's claim of ineffective assistance of counsel during the guilt phase on the ground that Agajanian's performance, while arguably deficient, did not prejudice the outcome of Visciotti's trial. I believe that Agajanian's deficient performance during the guilt phase was per se prejudicial pursuant to the Supreme Court's decision in *United States v. Cronic*, 466 U.S. 659 (1984). Accordingly, I dissent from Section III A of the majority opinion.

In *Cronic*, the Supreme Court identified certain circumstances where counsel's performance is "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," including where a defendant "is denied counsel at a critical stage of his trial" and where counsel "fails to subject the prosecution's case to meaningful adversarial testing." *Id.* at 658-59. I believe that Agajanian abandoned Visciotti at a "critical stage" of the guilt phase of trial and "fail[ed] to subject the prosecution's case to meaningful adversarial testing" because he conceded that Visciotti was guilty of first degree murder during his closing argument. *Id.* at 659. Agajanian's concession merits a finding of prejudice per se.

Although Agajanian delivered an unorganized and at times incoherent closing argument, his concession that Visciotti committed first degree murder is unmistakable. Agajanian told the jury that Visciotti was guilty of first degree murder if they found that "an implied malice killing of a human being"

occurred "during the course of a robbery," and then said: "*Ladies and Gentlemen, that is what the facts reflect. That is what the facts reflect in this particular case.*" (Emphasis supplied). Agajanian concluded his closing argument at the guilt phase by again acknowledging that Visciotti committed first degree murder. He said:

> *I think the bottom line in this case, ladies and gentlemen,* if we evaluate it from the evidence, if we evaluate it from what we have before us, the good, the bad, the ugly, I think that, plus the employment of the reasonable doubt standard in this particular case *will lead you to a verdict, even though it be first degree murder, that we have a killing which is not premeditated, which is not deliberated, which is not well thought out, which is not pondered, but, nevertheless, committed.*

(Emphasis supplied).

In *Swanson*, we found that *Cronic* applied when a lawyer conceded his client's guilt at trial, reasoning that "[a] lawyer who informs the jury that it is his view of the evidence that there is no reasonable doubt regarding the only factual issues that are in dispute has utterly failed to 'subject the prosecution's case to meaningful adversarial testing.'" *United States v. Swanson*, 943

F.2d 1070, 1074 (9th Cir. 1991) (quoting *Cronic*, 466 U.S. at 659). In this case, as in *Swanson*, the trial "los[t] its character as a confrontation between adversaries" when Agajanian conceded that Visciotti committed first degree murder. *Id.* at 1073.

The majority argues that Agajanian did not abandon Visciotti during his closing argument because Agajanian argued to the jury that "the crime was not premeditated" and "Visciotti lacked the specific intent to kill." However, once Agajanian conceded that Visciotti committed felony murder, these arguments about Visciotti's state of mind during the killing became irrelevant. As Agajanian explained to the jury during his closing argument, a killing during the commission of felony robbery is first degree murder regardless of the defendant's state of mind.

The majority also hypothesizes that Agajanian's concession was a strategic attempt to avoid the imposition of the death penalty, reasoning that "a jury might be less likely to impose the death penalty on someone convicted of felony murder, as

opposed to someone who set out to commit a premeditated murder." This hypothesis is unsupported by Agajanian's closing argument during the penalty phase, in which he told the jury that there was *no* mitigating evidence related to the circumstances of the crime or Visciotti's mental state. This hypothesis is also unsupported by Agajanian's testimony, during the state habeas hearing, that the family sympathy mitigation strategy was his *only* strategy to avoid imposition of the death penalty. Just as we cannot evaluate the reasonableness of counsel's strategic decisions through the "distorting effects of hindsight," we cannot, in hindsight, attribute to counsel a strategy that he did not actually have in order to make sense of his otherwise inexplicable conduct. *Strickland*, 466 U.S. at 689.

There is no doubt that this case was a difficult one to defend. However, as the Supreme Court instructed in *Cronic*, "even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." 466 U.S.

at 656 n.19. In conceding that Visciotti was guilty of felony murder, Agajanian relieved the prosecution of this heavy burden.

APPENDIX B

APPENDIX B

[Filed October 19, 1999]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN LOUIS VISCIOTTI,	CASE NO. CV 97-4591 R
Petitioner,	**DEATH PENALTY**
v.	JUDGMENT
ARTHUR CALDERON, Warden of California State Prison at San Quentin,	
Respondent.	

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the petition for writ of habeas corpus is **CONDITIONALLY GRANTED** in part and **DENIED** in part.

Insofar as it challenges the judgment of conviction and the finding of a special circumstance in the case People v. John Louis Visciotti, Case No. C 50770 of the California Superior

Court for the County of Orange, the petition for writ of habeas corpus shall be, and hereby is, **DENIED**.

The petition for writ of habeas corpus as to the judgment and sentence of death in the case People v. John Louis Visciotti, Case No. C 50770 of the California Superior Court for the County of Orange shall be, and hereby is, **GRANTED**. The judgment and sentence of death shall be **VACATED AND SET ASIDE**, as shall be any proceedings relating to carrying out that sentence.

IT IS FURTHER ORDERED that the State of California shall, within 120 days from the entry of this Judgment, either grant Visciotti a new trial on the issue of the appropriate penalty or vacate the sentence of death and resentence him in accordance with California law and the United States Constitution. 28 U.S.C. § 2241.

IT IS FURTHER ORDERED that the Clerk of this Court shall immediately notify the Warden of San Quentin Prison of this Court's judgment.

IT IS SO ORDERED.

Dated: Oct. 19, 1999.

/s/
MANUEL L. REAL,
United States District Judge

APPENDIX C

APPENDIX C

[Filed March 9, 1999]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN LOUIS VISCIOTTI,	CASE NO. CV 97-4591 R
Petitioner,	**DEATH PENALTY**
v.	ORDER
ARTHUR CALDERON, Warden of California State Prison at San Quentin,	
Respondent.	

Having ordered an evidentiary hearing in this matter, the Court hereby clarifies the scope of the hearing.

The state court has already held a hearing on Visciotti's claim of ineffective assistance of counsel in connection with the penalty phase. The state court made factual findings. The record provides no basis for concluding that the hearing was not "full and fair." In re Visciotti, 14 Cal.4th 325, 58 Cal.Rptr.2d 801 (1996). Most of Visciotti's complaints about the referee's

findings can be resolved from the record or have already been resolved favorably to him by the state court. A federal evidentiary hearing on this claim is unnecessary under Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992), and is probably precluded by 28 U.S.C. § 2254(e)(2).

The state court has not held an evidentiary hearing on any of the remaining claims in the petition. Accordingly, since no other claims appear to depend on the introduction of extra-record evidence, the hearing will be limited to the guilt phase aspects of Visciotti's claim of ineffective assistance of counsel, a conflict of interest, and competence to stand trial.

IT IS SO ORDERED.

Dated: March 9, 1999.

/s/
MANUEL L. REAL,
United States District Judge

APPENDIX D

APPENDIX D

[Filed December 9, 1996]

IN THE SUPREME COURT OF CALIFORNIA

JOHN LOUIS VISCIOTTI,	)	
	)	
on Habeas Corpus.	)	S031247
	)	

Petitioner John Visciotti was convicted by a jury in the Orange County Superior Court of first degree murder of Timothy Dykstra with a robbery special circumstance (Pen. Code, §§ 189, 190.2, subd. (a)(17)(i)), attempted murder of Michael Wolbert (Pen. Code, §§ 664/187),[1/] and robbery of both men (§ 211). The jury also found that he had personally used a firearm in the commission of the offenses (§ 12022.5) and that he intended to kill the murder victim, Timothy Dykstra. The same jury determined that petitioner should be sentenced to death. This

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1. All statutory references are to the Penal Code unless otherwise indicated.

SEE CONCURRING AND DISSENTING OPINIONS

court affirmed the judgment in its entirety. (*People* v. *Visciotti* (1992) 2 Cal.4th 1.)

In a subsequently filed petition for writ of habeas corpus, petitioner asserts ineffective assistance of counsel, relying on both the record of the trial and evidence outside the record. This court issued an order to show cause limited to the issue of ineffective assistance of counsel at the penalty phase of the trial. In so doing we implicitly concluded that allegations that petitioner received prejudicially ineffective assistance of counsel at the guilt phase and was denied the right to trial before an impartial tribunal failed to state a prima facie case. (*People* v. *Miranda* (1987) 44 Cal.3d 57, 119, fn. 37; *People* v. *Bloyd* (1987) 43 Cal.3d 333, 362-363.)

After the filing of respondent's return and petitioner's traverse, we determined that disputed facts necessitated an evidentiary hearing. (See *People* v. *Romero* (1994) 8 Cal.4th 728, 737-740; *In re Lawler* (1979) 23 Cal.3d 190, 194.) The Honorable Eileen C. Moore, Judge of the Orange County

Superior Court, was appointed referee with directions to take evidence and make findings of fact on the several questions that will be discussed below.

After an independent review of the appellate record and record of the evidentiary hearing, we conclude that, assuming petitioner's trial afforded inadequate representation in some respects, petitioner has not demonstrated that those failings were prejudicial. Because he has not established that absent those failings it is probable that a more favorable result would have been reached by the penalty jury, he is not entitled to relief. We shall, therefore, discharge the order to show cause and deny the petition for writ of habeas corpus.

I

Background

The events leading to the murder conviction and imposition of the death penalty are set forth in *People* v. *Visciotti*, *supra*, 2 Cal.4th 1. Briefly, petitioner and Brian Hefner, who had been employed as salesmen by a company which also employed

victims Timothy Dykstra and Michael Wolbert, lured the victims to a remote area of the Anaheim Hills on Santiago Canyon Road in Orange County in a preplanned robbery scheme. There the victims were robbed, shot, and abandoned. Dykstra died at the scene. Wolbert survived, notwithstanding bullet wounds in the torso and face, and testified against petitioner whom he identified as the shooter.

Wolbert described petitioner's methodical execution of Dykstra and attempt to murder Wolbert. Petitioner directed Wolbert, in whose car the four were driving, to the site where the crimes were committed. Before leaving with petitioner and Hefner, Wolbert and Dykstra had hidden the pay they had just received behind the dashboard of Wolbert's car. Petitioner asked Wolbert to stop, claiming a need to relieve himself. Dykstra got out to let petitioner out of the back seat. Hefner followed. At that point Wolbert saw a gun in petitioner's waistband. Wolbert left the car also and saw petitioner pointing

the gun at Dykstra. The pair were face to face, less than two feet from each other, next to the passenger side of the car.

As Wolbert walked to the back of the car he ran into Hefner who said "he's not fucking around." Petitioner then demanded the victims' wallets and threatened Dykstra. Dykstra and Wolbert sat on an embankment at the side of the road, Dykstra near the front of the car, Wolbert a few feet behind the car. Wolbert told Hefner where the money was hidden. Hefner went to the car and returned with the money. Wolbert asked petitioner to take the car and the money, but to let him and Dykstra go, promising not to identify petitioner. While Hefner was in the car, petitioner had moved closer to Wolbert, but when Hefner returned petitioner moved back to the location at which Dykstra was seated, raised the gun, and shot and killed Dykstra. Wolbert arose and took several steps back as petitioner approached him with the gun. Petitioner raised the gun, holding it with two hands extended out from his chest, and shot Wolbert. The first shot was from a distance of about six feet. It hit Wolbert in the

rib cage. Wolbert fell. As Wolbert lay on the ground and looked at petitioner, petitioner stepped closer to Wolbert. Standing at Wolbert's feet, about three feet from him, petitioner raised the gun and shot Wolbert again. This shot hit Wolbert in the left shoulder. When petitioner began to walk away, Wolbert got up. Petitioner turned as Wolbert approached, and from a distance of two feet put the gun to Wolbert's head and shot him again. This shot hit Wolbert in the left eye. Petitioner and Hefner then abandoned the victims, taking Wolbert's car, and fled the crime scene. Each time petitioner fired the gun he had to pull the hammer back to manually cock it.

Petitioner and Hefner, who was separately tried and sentenced to life imprisonment without possibility of parole, were quickly apprehended. Petitioner confessed and participated in a videotaped reenactment of the crime.

The defense presented evidence at trial that petitioner had learning disorders attributed to a minimal brain injury, had ingested drugs prior to the crimes, was not completely aware of

his actions during the offenses, and was unable to judge the nature and consequences of his actions. Evidence of petitioner's history of drug and alcohol abuse was also presented in support of an expert's conclusion that petitioner was in a drug-induced psychotic state at the time of the murder and attempted murder.

The defense offered mitigating evidence at the penalty phase in testimony by petitioner's parents, siblings, and girlfriend about petitioner's love and concern for his family, his helpfulness, and his musical and artistic talent. The family members testified that petitioner's personality changed when he was under the influence of drugs, and his father testified about his efforts to persuade petitioner to cease using drugs---efforts that included "punching" petitioner across the room, and bribing him. The penalty phase argument by defense counsel Roger Agajanian was, as we described it in the decision on appeal "a rambling discourse, not tied to particular evidence" (*People* v. *Visciotti*, *supra*, 2 Cal.4th at p. 82, fn. 45) during which counsel asked the jury to spare petitioner's life because he was the only

bad child of a loving family who would suffer if petitioner were to be executed.

II

The Ineffective Assistance Of Counsel Claim

The claim on which the order to show cause issued is petitioner's assertion that he received constitutionally ineffective assistance of his counsel, Roger Agajanian, at the penalty phase of the trial. In a related claim that we deem part of the ineffective assistance of counsel claim, petitioner alleges that counsel labored under a conflict of interest which affected counsel's ability to forcefully and competently represent him. We decline petitioner's request that we reconsider our conclusion that his other claims do not state a prima facie case for relief.

A. Penalty Phase Representation/Conflict of Interest Claim

Petitioner's allegations in support of his claim of constitutionally inadequate representation by trial counsel extend

to counsel's preparation for and performance at the penalty phase of the trial. He attributes counsel's tactical decisions and deficient performance at this stage to both incompetence and the assertedly prejudicial impact of a conflict of interest.

Allegedly counsel labored under a conflict of interest that existed because of financial arrangements between counsel and petitioner's family, who retained Agajanian, agreeing to pay $25,000 for representation at trial and to pay for experts and investigation. Petitioner claims the family paid only $5,000 to $7,500. Agajanian did not seek public funds for investigation or experts, although petitioner was indigent, apparently believing that such funds were not available when a defendant has retained counsel.

Petitioner also alleges that Agajanian's investigator, Grasso, performed only "minimal tasks," including a visit to the scene of the offenses, group interviews with family members, and one interview with petitioner's girlfriend. Petitioner alleges that no other investigation was undertaken, no records obtained, and no

nonfamily witnesses were interviewed. He also alleges that counsel did not act competently in interviewing the witnesses and in inspecting the physical evidence, and did not prepare properly for trial. Counsel did not ensure that his expert, Dr. Broussard, was adequately prepared, with the result that Dr. Broussard did not have access to crucial information and was not given important evidence. Dr. Broussard interviewed petitioner only once and, allegedly, did not conduct a meaningful examination of petitioner.

At the penalty phase counsel's theory was to invoke jury sympathy for petitioner's family.

Petitioner alleges that counsel's failings at the penalty phase are attributable in part to the conflict of interest which arose because counsel could not "bite the hand that feeds him." Agajanian was dependent on the family to pay the unpaid balance of his fee. Petitioner claims that, as a result of the conflict, counsel did not present available evidence that, far from being a child of a loving family, petitioner was raised in a

dysfunctional family in which both physical and psychological abuse were inflicted on petitioner by his parents. Petitioner implies that counsel was concerned that if evidence of this mistreatment were presented the remaining fee would not be paid.

Incorporating all of the above allegations of inadequate representation by trial counsel at the guilt phase into his assertion of penalty phase incompetence, petitioner alleges that trial counsel failed to offer a viable penalty phase defense, failed to make appropriate objections and motions, and stipulated to an improper response to a jury inquiry. Allegedly, counsel failed to investigate and attack or impeach aggravating evidence and witnesses. He did not take the advice given, or undertake the steps recommended, by Dr. Sharma, a forensic psychiatrist, which steps were necessary to adequate penalty phase representation. Instead, he presented an allegedly "inadequately developed, ill-conceived and ineffective" theory of invoking sympathy for petitioner's family, gave a rambling argument not

tied to any evidence, and mistakenly argued that impaired mental state, a mitigating factor, was not present. Moreover, counsel did not request a limiting instruction regarding consideration of the evidence of past arrests and criminal conduct so as to reduce the prejudicial impact of "inadmissible" evidence; did not sufficiently object and make an offer of proof to support a continuance to prepare to rebut the testimony regarding a 1978 knife assault on Kathy Cusack; did not object to the testimony of William Scofield about that assault; stipulated to what he claims was an incomplete and prejudicial response by the court to juror questions regarding the mitigating factors of extreme duress and moral justification; did not object to instructions permitting the jury to consider nonviolent conduct in aggravation; and did not object or seek admonishment regarding allegedly improper penalty phase argument which included reference to possible unproved escapes, personal insights and background of the prosecutor, excuses for "distasteful" prosecution witnesses, a suggestion that "phantom" mitigating evidence could be

considered aggravating, a misleading assertion that coperpetrator Hefner had no criminal record, misleading argument that petitioner was the "bad seed" in a "nice" family, use of age as an aggravating factor, and portrayal of the sentencing process as a mechanical mandatory weighing process.

Petitioner's principal claim is, however, that counsel failed to investigate, discover, and use mitigating evidence regarding petitioner's upbringing in conditions which, he claims, would have explained to the jury his resort to drugs and alcohol and, ultimately, to these offenses. He alleges that his family was not supportive and loving, that his parents engaged in interspousal conflict, physical battering, verbal abuse, labeling and mistreatment. Petitioner was the fifth child. He was born with severe club feet which required that he wear splints and braces for three years. He was stigmatized and isolated as a result. His condition caused severe financial problems and stress in the family.

The family moved at least 20 times by the time petitioner was 16 years old. This disrupted and undermined his education and social development, and contributed to feelings of insecurity and low self-esteem. When petitioner was 13, a potential seizure disorder was diagnosed and brain damage was suspected as a cause of his problems. He first experimented with drugs in grammar school when his father abandoned the family. During adolescence petitioner experimented with a wide variety of street drugs. His long-term drug use affected his ability to concentrate and impaired his mental functions.

Petitioner allegedly suffers from a mild neuropsychological impairment and has a significant discrepancy between verbal and nonverbal memory. He has mild motor function deficits and difficulty in complex/abstract thinking. In the structured environment of juvenile camp his behavior improved. Notwithstanding his problems, he was capable of and performed altruistic acts of sincere kindness.

Petitioner contends that this, and other mitigating evidence would have demonstrated that the evidence offered by the prosecution was inaccurate and misleading. The prosecution evidence could have been impeached and its impact diminished.

Our issuance of an order to show cause on these allegations reflected a preliminary determination that, if true, they stated a prima facie case for relief (*In re Hochberg* (1970) 2 Cal.3d 870, 876, fn. 4.)

Director of Corrections filed a return to the order to show cause accompanied by a declaration by trial counsel Roger Agajanian in which trial counsel states that while he had extensive contact and conversations with members of petitioner's family, there was no mention of petitioner having been abused by his parents, of his childhood deformity, or of a dysfunctional family environment. Counsel declared that even had he known of petitioner's family background and the abuse he would not have presented the evidence. It was his opinion that any attempt to gain sympathy for petitioner would have

failed. Had he presented the evidence, he could not have had petitioner's parents present at the trial and would have given the jury the impression that petitioner's family had abandoned him. His strategy of garnering sympathy for family members had been successful in prior murder cases in which the jury returned not guilty verdicts. He did not follow up with the two court-appointed experts, as their testimony would not have been consistent with that of counsel's own expert regarding petitioner's mental state at the time of the offense. Counsel said his ignorance that petitioner had stabbed Kathy Cusack during the 1978 assault on Scofield was due to petitioner's failure to tell him about Cusack.

After reviewing the return and petitioner's traverse, we concluded that it would be necessary to resolve several disputed factual matters in order to determine whether petitioner is entitled to relief. The referee was therefore ordered to take evidence on and make findings of fact on the following

questions, the relevance of which to petitioner's claims will be explained below:

1. Did trial counsel Roger Agajanian interview members of defendant's family and/or family friends, and, if so, what information did he obtain from them which did or should have alerted him to the existence of potentially mitigating penalty phase evidence?

2. Did trial counsel conduct any other investigation of penalty phase defenses or become aware of potentially mitigating evidence from any other source?

3. Did the court-appointed psychiatric experts, Dr. Kaushal K. Sharma and Dr. Seawright Anderson, view any postarrest videotape of petitioner; did trial counsel review reports by those experts regarding defendant's mental condition; and did counsel receive and respond to the requests made by Dr. Kaushal K. Sharma on May 8, 1983, and May 31, 1983, for additional background information regarding defendant?

4. What was the content of the report to the court by Dr. Seawright Anderson?

5. In preparation for trial did trial counsel review any medical and/or psychiatric/psychological records; school records; juvenile court records; or other materials relevant to defendant's history?

6. Was trial counsel's decision to forego presentation at the penalty phase of evidence regarding defendant's childhood and adolescence an informed and knowledgeable decision?

7. Was trial counsel's penalty phase strategy affected in any way by the fee arrangement between counsel and defendant's parents?

III

Evidence Received at the Hearing Before the Referee

Petitioner presented evidence to support the factual allegations of the petition related to trial counsel's lack of preparation and investigation of potentially mitigating evidence. He also presented evidence to support his claim that mitigating

evidence was available. That evidence, discussed in greater detail below, included the testimony of family members and friends regarding the discordant atmosphere in the Visciotti family home created by an unending series of physical and verbal confrontations between petitioner's parents; physical punishment of petitioner and his siblings; threats of violence; impermanence caused by the family's numerous moves and its impact on school attendance and the ability to make lasting friendships; the children's efforts to escape the household turmoil by hiding, leaving the house, early marriage, and resort to drugs as "self-medication." Social workers, psychologists, and other witnesses testified regarding the impact of these events on petitioner's development and ability to function in society.

Petitioner's theory is that all of this evidence might have been presented to the jury had counsel discovered it and elected a penalty phase tactic other than an attempt to elicit sympathy for petitioner's family - the "family sympathy" defense. The evidence offered at the evidentiary hearing regarding trial

counsel's lack of preparation and investigation was uncontradicted. The recollections of family members regarding some occurrences during petitioner's childhood differed in some respects, but the evidence that the family life was chaotic and that petitioner suffered parental verbal abuse throughout his childhood was uncontradicted. The evidence offered at the hearing before the referee is summarized below.

A. Trial counsel's investigation and preparation for penalty phase trial.

Roger Agajanian was admitted to the bar in this state in July 1973. He had never tried a capital case that went to the jury before the Visciotti case, and had never conducted a penalty phase trial. He had tried several murder cases between 1981 and 1983, however. He decided prior to jury selection in the Visciotti trial, when he saw petitioner's videotaped reenactment of the murder, that he would attempt to elicit sympathy for petitioner's family as his penalty phase strategy. He believed that, although sympathy for petitioner could not be expected,

sympathy for petitioner's parents might be. His defense would therefore suggest that the parents were nice people whose son should not be killed.

Evidence was also presented that when he made that decision Agajanian had never represented a client at the penalty phase of a capital case and in none of his self-described successful presentations of a family sympathy defense in prior cases was family sympathy evidence relevant to any issue in the case and in none could the effort be accurately described as "successful."[2] The other basis for counsel's hope that family sympathy might sway the jury was his belief that, in a widely reported case in which Agajanian had no involvement, a jury acquitted the defendant of a narcotics-related charge and in doing so was influenced to accept an entrapment defense by the loyalty

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2. In one of the four cases in which counsel claimed to have relied successfully on eliciting juror sympathy for the family of the defendant, there were no jurors. In another, the defendant was convicted as charged.

displayed by the defendant's wife who was regularly in attendance at the trial.[3]

Agajanian testified that he did not conduct formal interviews with any members of petitioner's family in preparation for the penalty phase. He did no investigation and did not have a social worker or investigator do any investigation to seek potentially mitigating evidence. He conceded that when he made his decision regarding trial of the penalty phase he had no information about petitioner's background other than what appeared to him to be "good aspects" of the family. The decision that no effort would be made to pursue a sympathy defense based on petitioner himself was made without knowing what other evidence for a defense he might find if an investigation was pursued. While he was aware that petitioner

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3. The court has not considered whether family sympathy is within any statutory factor (§ 190.3) or an aspect of the defendant's character or record which the jury must be allowed to consider. (See *People* v. *Cooper* (1991) 53 Cal.3d 771, 844.) Inasmuch as we assume arguendo that petitioner's trial counsel's decision to rely on this penalty phase strategy was not competently made, we need not do so here.

had abused drugs, he had never had a jury return a favorable verdict when the defense was based on drug use.

Agajanian testified that he had no information about petitioner's family when he made his decision on penalty phase tactics. That testimony was contradicted by his expert, Dr. Louis Broussard, who testified that Agajanian told him that there was some "brutality" in the family. Dr. Broussard also testified that Agajanian had explained the limited scope of the examination Broussard was asked to perform and report on was appropriate because the "DeLorean case" had convinced Agajanian that a jury was less likely to convict if there was substantial family support.

At the request of Agajanian, the trial court appointed two experts in the mental health field, but only to assess petitioner's competence to stand trial and sanity at the time of the offenses. Neither testified at the trial. Both testified at the evidentiary hearing.

Dr. Seawright Anderson, a psychiatrist who had been appointed in approximately 25 capital cases prior to his appointment in the Visciotti case, testified that in such appointments defense counsel usually contacts him to advise him of the things in which the attorney is particularly interested. It is his practice to await such contacts until the attorney provides him with the arrest report and background information which the court does not provide. His staff contacts the attorney if the attorney has not already provided the information needed.

Dr. Anderson was appointed to evaluate petitioner only under sections 1026 and 1368, i.e., to determine if petitioner was sane at the time the offenses were committed and whether he was competent to stand trial. In evaluating petitioner, Dr. Anderson read the arrest report and documents from the Youth Authority and Department of Corrections compiled at the time of petitioner's prior commitment after conviction of assault with a deadly weapon. His staff obtained those documents for him from Agajanian's office. He reviewed no other documents. The

notes of his office manager indicated that Agajanian wanted Dr. Anderson to consider petitioner's drug history, his prolonged use of cocaine, and the "new diminished capacity." Dr. Anderson did not review the videotaped reenactment of the offense or the videotape of petitioner confessing to the crimes. He was provided with no previous drug history, no probation reports, and no psychological reports from the Youth Authority or Department of Corrections.

Dr. Anderson interviewed petitioner for slightly over one hour. He did not administer any psychological tests, although they would have been useful if diminished capacity were in issue. They were not necessary to determine sanity and competence. Dr. Anderson recommended that an electroencephalogram (EEG) and computer assisted tomography (CAT) scan be administered to rule out the possibility of organic brain disorder, as petitioner had a history of head injury and prolonged substance abuse. He would have assisted Agajanian in arranging for those tests, but was not asked to do so. Once his

report was sent to Agajanian, he heard nothing more about the case.

During the interview with Dr. Anderson, petitioner did not state that he had been mistreated by his parents. Dr. Anderson testified that it is not unusual for a patient to omit this as such reference brings up uncomfortable fee lings and the patient is depressed. In Dr. Anderson's experience it is not unusual for a patient to minimize abuse, especially when it is inflicted by the patient's parents.

In his report, Dr. Anderson concluded that petitioner was competent to stand trial and was sane at the time of the offense. He also reported, however, that as a result of prolonged drug abuse and paranoid ideation, petitioner suffered from diminished capacity at the time the charged offense was committed and was unable to meaningfully and maturely reflect on the gravity of the contemplated acts. He also concluded that petitioner was addicted to cocaine, amphetamines, and marijuana, and recommended that an EEG and a CAT scan be performed to rule

out the possibility of organic brain disorder, and that psychological tests be administered to obtain more information about petitioner's basic personality structure.

Dr. Kaushal K. Sharma, a forensic psychiatrist, was the second expert appointed by the court. Agajanian did not supply him with any background information regarding petitioner and did not reply to a letter asking for that information. Dr. Sharma went personally to Agajanian's office and obtained some documents. He never spoke with Agajanian. He examined petitioner and, on July 19, 1993, wrote to Agajanian stating that he had not detected any psychiatric impairment. The letter explained, however, that the statement was based on a very limited interview and a rather superficial examination of the documents supplied to him. The letter was not intended to be a report. Instead it was a means of closing Dr. Sharma's file because he did not have the time or patience to continue "bugging" Agajanian for the information he had requested from him.

Based on these reports, Agajanian concluded that neither of these experts would be helpful to the defense. He therefore contacted Dr. Louis Broussard, a psychologist who had undertaken examinations for him in approximately 20 prior cases, two or three times under appointment, and had testified for Agajanian two or three times. Dr. Broussard testified that Agajanian often contacted him after a case was already in trial in order to deprive the prosecution of access to his reports.

In the Visciotti case, Agajanian told Broussard only that he wanted testing and findings, and that it was a murder trial. Dr. Broussard spent no more than one hour with Agajanian and did receive some information about "brutality" in the family from Agajanian, but he did not receive any social or family history. They did discuss diminished capacity. Agajanian was aware that the defense had been abolished, but Agajanian believed that evidence of diminished capacity could come in nonetheless and "the jury could make up its mind."

Dr. Broussard's testing and interview took no more than two and one-half hours. It was performed on July 22, 1983, two days after the People rested in the guilt phase of the trial.[4] He did not obtain a comprehensive social history from petitioner, and told Agajanian that he should obtain a licensed clinical social worker to do that. His interview was only to find out what happened when the crimes were committed and to ascertain why from the defendant's point of view. He did not obtain a drug history as the defendant was "a little bit out of it" on that day and was not terribly responsive. Dr. Broussard first explained his failure to attempt a further interview with defendant on the basis that he had the information he needed for his report and did not think he would obtain more information in a further interview because, based on the tests he had administered, he believed that the defendant was then operating at his capacity. He later testified that the reason he did not see the defendant again and

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4. Agajanian explained his delay in contacting Dr. Broussard by stating that he planned to use the expert only at the penalty phase. In fact, Dr. Broussard testified only at the guilt phase.

perform additional tests was the time problem. He was hired late in the case and was told that he would testify in the week after he first saw Agajanian about the case. Agajanian said that Dr. Sharma had advised Agajanian that it was a very serious case and would require comprehensive investigation and that the cost of those investigations would be approximately $2,500, which Agajanian was not willing to take the time for or to pay for.

Dr. Broussard testified that his focus was limited to guilt phase considerations. Agajanian did not want more than present psychological factors to be considered, as his strategy was to show family solidarity. He did not want an opinion on childhood abuse in the report or for Dr. Broussard to indicate that there was any problem in the family, no matter how important information about the family was.

Additional lack of preparation for the penalty phase of the trial was offered in evidence that Agajanian did not review the prosecutor's file. Although it was the practice of the district attorney at the time of the Visciotti trial to make the case files of

prosecutors available to defense counsel, Agajanian was not aware that during petitioner's 1978 assault with a deadly weapon on William Scofield, petitioner had also repeatedly stabbed Kathy Cusack who was pregnant. Agajanian did not send for the police report or go through the prosecutor's file to read it in advance of trial and thus was surprised and unprepared to face that evidence. He stated that he had not seen the report and was not aware of the Cusak incident because petitioner lied to him.

Agajanian testified that at the time of trial petitioner's father, Luigi Visciotti, had paid only a fraction of the $25,000 fee, and that over the course of the representation Luigi had paid a total of approximately $5,000 and done some tile work for Agajanian because he had no more money. Agajanian believed he was owed about $15,000. Luigi testified that a boyfriend of his daughter Ida had given Agajanian a $17,000 lien on the friend's anticipated accident settlement. Luigi believed that he owed Agajanian $7,000 when the trial began and had paid off the debt with tile work, tree trimming, and cleanup work.

B. Undiscovered mitigating evidence.

The evidence that counsel did not discover and present consisted principally of the social, medical, and family history of petitioner. One of petitioner's experts, Shirley Reece, M.S.W., a licensed clinical social worker and professor at the University of California at San Francisco, prepared a social history of petitioner. She described that history as offering "overwhelming mitigating circumstances" in "an absolutely horrendous family history." The family and social history came from hospital, school, probation, Youth Authority, and Department of Corrections records and from information supplied by close family members.

Professor Reece testified that the interaction between petitioner's parents was extremely volatile, hostile, and mutually abusive, both physically and verbally. Without exception the children described the family as chaotic, stating that they lived a life of terror. They were always frightened and often worried that the parents would kill each other. Petitioner's father

continually berated him, called him stupid and retarded, and threatened to break his legs. The children were blamed for the family's difficulties, and some were beaten with a belt and slapped. Economic problems and the number of children caused the family to move often which had a profound effect on the children. Petitioner left kindergarten after nine days and was not re-enrolled in school for the first grade for two years. The overall record of school attendance and withdrawal was appalling and destructive to petitioner's development. That family situation, petitioner's short stature, and the epithets used by his father which petitioner "internalized" and began to believe were true, led to a person who was markedly lacking in self-esteem and depressed. He thought he could never do anything right and could never do anything to please his parents. He was highly self-critical and blamed himself for things for which he had no responsibility such as his parents' difficulties. He had

suicidal ideation and had nowhere to turn other than drugs for a way out.[5]

Jay Jackman, M.D., an expert in forensic psychiatry with extensive experience in substance abuse cases, reviewed the same background information. Prior to his testimony, he had reviewed declarations by members of petitioner's family, the trial testimony of petitioner, the videotapes in which petitioner reenacted the crime and was interviewed by police, as well as numerous other medical, Department of Corrections, Youth Authority, probation, and school records related to petitioner, all of which were available and could have been discovered by Agajanian with reasonable investigation. He examined petitioner twice.

In the opinion of Dr. Jackman, it is necessary to spend a minimum of 15 to 20 hours interviewing a capital defendant.

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5. Professor Reece interviewed petitioner's parents, who engaged in a heated argument during the interview. She described the event as "quite extraordinary," testifying that the parents shouted and menaced one another to the point that a staff member came from another room to ask if they could "tone it down."

That time is particularly important in cases of childhood abuse because it is necessary to develop a relationship of trust. Persons with a history of abuse are extraordinarily protective of their families. They are defensive about their own abuse history and are very reluctant to talk about it. He was able to spend only about 10 hours in interviews with petitioner because of time and monetary constraints, but if he were testifying before a jury he would do a longer workup.

Petitioner was born with club feet, a moderately severe congenital abnormality. Dr. Jackman testified that this had a very negative effect on both petitioner and his family. Treatment for the condition was expensive and strained the resources of the family. Petitioner's mother, Catherine, never worked outside the home and his father, Luigi, was a marginal wage earner. Corrective treatment prevented petitioner from walking until he was three years old and required first Dennis Brown splints and then special shoes which the family could not afford without help from petitioner's grandparents, a factor that impacted on his

father's self-image. Luigi "took it out" on the children and in particular on petitioner whom he resented. He used threats to break petitioner's legs to terrorize him, saying he had paid to have the legs fixed and would break them again. Although petitioner had no memory of the condition and treatment, Dr. Jackman believed that the birth handicap had a colossal and devastating effect on petitioner's self-image because from his earliest self-awareness, he was aware that he was different from other children. The result was feelings of inadequacy, incompetence, inferiority, worthlessness and low self-esteem.

Petitioner told Dr. Jackman that he began to experiment with drugs at age eight when he was exposed to marijuana, apparently by boyfriends of his sisters. The materials supplied to Dr. Jackman and the declarations from family members described the Visciotti home at that time, and throughout petitioner's childhood, as chaotic, a battle zone, hostile and nasty, where the parents continuously verbally and physically abused each other and the children. There were no expressions

of love between the parents or from the parents to the children. Petitioner's parents called him an "asshole," a "mother fucker," "stupid," and "retarded." His father told him he would never amount to anything and subjected him to a series of devaluing comments.

The family moved at least 20 times while the children were growing up. The children changed schools often, were never up with their classes, and had few friends in school. As a result most of the children disliked school and attended sporadically. The constant moves impacted petitioner's ability to function in school and in his social world. He was always an outsider.

The battles between petitioner's parents involved screaming that could be heard more than a block away. His mother threw objects at his father. The fighting was so intense that the children feared that their parents would kill each other. When they were young the children hid in their bedrooms or closets when the fights occurred. When older they left the house. Petitioner's older sisters married in their midteens, in part to

escape the home environment. Only three of the children remained in school to graduate from high school. On three occasions, petitioner's father abandoned the family and moved in with women friends.

Petitioner's first use of drugs coincided with the birth of his younger brother Tony, one of the occasions on which his father abandoned the family.

Petitioner's reaction to his parent's battles was to hide in a dark place. He also found hiding places in abandoned cars where he could spend time away from the home situation.

While in Youth Authority custody and away from the family, petitioner's behavior and his schooling improved markedly. He was not a behavior problem and did all jobs expected of him. Staff members believed that he was not a typical delinquent and had him tested for a brain abnormality. An EEG was abnormal and suggested a seizure disorder so Dilantin was prescribed. While taking the medication petitioner did not abuse drugs and his behavior was significantly improved. He

was not considered by Youth Authority staff to be a drug abuse problem. Notwithstanding the family situation, petitioner always expressed a desire to go home when in Youth Authority custody. Youth Authority staff noted, however, that what appeared to be a close-knit family was at the point of falling apart, a problem that terrified petitioner to the point that he stuttered when he talked about it. Whenever petitioner was released to the family's disorganized psychological environment, which Dr. Jackman termed a "toxic" environment, the negative behavior and drug abuse returned. Dr. Jackman testified that it was not unusual for an abused child to still love and feel attached to the parents.

Dr. Jackman believed that until petitioner was eight his method of escaping the family situation was physical - he absented himself from the home. Later, drugs afforded him an alternative means of escape. Between the ages of eight and twelve petitioner used alcohol and Seconal, a sedative hypnotic. The drug relieved a psychotic mood, a painful, unpleasant mood state caused by the family situation, and made him feel

"mellow." Dr. Jackman described this drug use as a self-medication pattern often seen in children who use self-medication to control the undesired, unpleasant moods they have, changing drugs as their mood changes.

In his early teens, petitioner began to use amphetamines, preferentially "uppers" to overcome depression as the "downers" he had used before no longer had the desired effect. At that time he was doing very poorly in school and missed as many days as he attended. He had no social relationships and was what Dr. Jackman described as "basically a depressed kid." At 15 petitioner began using cocaine which became his drug of choice by the time he was 18. In his later teens, petitioner also used what petitioner described as "cannabis," but which Dr. Jackman testified was actually phencyclidine or PCP, a drug that distances people from their experience so that they become dispassionate observers of what goes on in their world. This drug enabled petitioner to see and participate in the family but not feel what went on emotionally. Most of the criminal conduct in which

petitioner engaged occurred during a period when he had progressed to injecting PCP intravenously several times a day in order to have that detached experience.

Dr. Jackman believed that petitioner's criminal behavior was directly related to his drug use. The behavior was impulsive. Petitioner was not a criminal or antisocial personality. He had a number of "prosocial" behaviors which Dr. Jackman had not seen in antisocial personalities who were killers.

Additional potentially mitigating evidence of which counsel had no knowledge was offered in the testimony of family members whose declarations had been reviewed by Professor Reece and Dr. Jackman.

The family members testified consistently with their trial testimony that petitioner was a kind and considerate person when not under the influence of drugs. Petitioner's siblings also testified, consistent with the social history recited by Professor Reece, about the chaotic family life brought about by the volatile

nature of the relationship between their parents, the alleged physical and psychological abuse of petitioner and his siblings by their parents, and the family's peripatetic existence. On cross-examination, however, the siblings conceded that the instances of "physical abuse" by their mother that they had described occurred when the children were being punished for misbehavior. Their testimony suggested that, contrary to the evidence offered at the penalty phase, petitioner was not the only "bad seed" in an otherwise loving family. Several of his siblings had criminal records related to substance abuse. His father also had a criminal record. It also appeared, however, that the family was a loving family in which petitioner's older sisters, although they left the home to marry in their midteens in order to avoid the turmoil, returned home regularly on Sundays for family meals.

IV

Referee's Report/Petitioner's Exceptions/Findings of this Court

After an evidentiary hearing, Judge Moore filed her final report on November 17, 1994. Petitioner has filed exceptions to the report and both petitioner and respondent have filed briefs on the merits.

In this proceeding, the referee's conclusions of law and resolution of mixed questions of law and fact are subject to independent review. The findings of fact are not binding on this court, but are given great weight if supported by substantial evidence since the referee has had the opportunity to observe the demeanor of the witnesses and the manner in which they testified. (*In re Hitchings* (1993) 6 Cal.4th 97, 109; *In re Marquez* (1992) 1 Cal.4th 584, 603.)

The findings of Judge Moore in response to the court's questions are summarized below:

Question 1. Yes, Roger Agajanian interviewed most of petitioner's very large family, largely with the family as a whole as his intention was to ens ure consistency in their testimony. He asked them what the family was like. The information he obtained was that the family gave the appearance of being cohesive, concerned, supportive and close to each other. He did not uncover information that the family was dysfunctional. It was his decision to utilize the positive image of the family as mitigating penalty evidence by going forward with the defense of sympathy toward the family so the jury would conclude petitioner, as the one stray, was worth saving because the family was so good. Even had petitioner been abused by his family, counsel would not have introduced such evidence in an attempt to garner sympathy for petitioner since he consciously decided not to delve into those areas. He knew that once the jury heard about the senseless and heinous nature of the case and the stabbing of a pregnant woman, they would not care how terrible petitioner's childhood may have been. He wanted the jurors to

focus on someone other than petitioner. He saw the positive appearance the family portrayed. Having seen other situations where jurors were lenient toward a defendant because they liked the defendant's family, he made the choice to focus on petitioner's family, believing the jury would reject any attempts to place petitioner in a sympathetic position.

Petitioner objects to the referee's finding that Agajanian interviewed members of the family. He claims, and the record supports the claim, that Agajanian did not conduct formal interviews with any members of petitioner's family other than petitioner. He met with some of them when he was retained and conversed with some of them at luncheon meetings during the trial. No matters of substance were discussed in those conversations. Petitioner's background and the family history were not discussed. Agajanian did not question any family members, individually or together, with the purpose of gathering evidence or information that might be used at the penalty phase of the trial.

We conclude that, while Agajanian did not "interview" members of petitioner's family as this court intended the word to be understood, he did speak with them and obtained information about the mitigating evidence that he subsequently elicited from the family members during the penalty phase of the trial.

Petitioner also objects that the referee's response goes beyond the question put by the court, erroneously states that at the time in question petitioner had been "convicted" of a heinous crime, and erroneously assumes that Agajanian was aware that evidence of the stabbing of Kathy Cusack would be presented at the time he elected to present only a family sympathy defense. These claims have merit. Agajanian made his penalty phase decision before the trial. He conceded at trial and in this proceeding that he did not know evidence of the Cusack stabbing was to be presented.

Question 2. No, trial counsel did not conduct any other investigation of penalty phase defenses or become aware of

potentially mitigating evidence from any other source. He did not care what a social history of the family and petitioner demonstrated in that, because of the heinous nature of the crime and the lack of remorse demonstrated in police videos by petitioner, he had no intention of introducing any evidence in an attempt to draw sympathy to his client. Instead trial counsel chose to attempt to draw sympathy to the family of defendant in an attempt to make it difficult for the jury to decide this family's one stray, its son and brother, should be executed.

Petitioner does not object to the referee's finding, which is supported by the evidence.

Question 3. Neither court-appointed expert (Dr. Kaushal K. Sharma and Dr. Seawright Anderson) viewed any post-arrest videotapes. Trial counsel did review the formal written report of Dr. Anderson, and a letter of Dr. Sharma which stated that on the basis of a very limited interview with petitioner, Dr. Sharma was not able to detect any information which would suggest psychiatric impairment in the defendant for the purpose of a

psychiatric legal defense. Counsel decided not to use either doctor based on those reports. Instead he hired Dr. Broussard, a licensed psychologist with whom he had worked in the past and with whom he was confident he could work. Counsel received and did not personally respond to the requests made by Dr. Sharma. Most likely counsel's office staff provided the police reports and other documents Dr. Sharma had requested in his letters of May 8 and May 31 to counsel.

Petitioner does not object to the finding that the experts did not view the videotapes. That finding is supported by the evidence. He points out, however, that the record establishes that the "other documents" eventually supplied to Dr. Sharma were limited to an arrest record and "rap sheet." They did not include any other background information about petitioner. We agree.

Question 4. The report of Dr. Anderson was submitted as an exhibit to the referee's report.

Petitioner does not object to this finding. Dr. Anderson's conclusions have been summarized above.

Question 5. No, counsel did not review any records or other material relevant to petitioner's history.

Petitioner does not object to this finding which is supported by the evidence.

Question 6. Yes, trial counsel's decision to forego presentation of evidence at the penalty phase was an informed and knowledgeable decision. Counsel was an experienced criminal trial attorney who used his knowledge, experience, professional instinct and intuition in making his decision.

Petitioner objects that this finding, which is a conclusion of law or resolution of a question of mixed fact and law, is not supported by the evidence. The term "informed and knowledgeable decision" has a specific meaning when used in assessing the adequacy of counsel in the representation of a defendant charged with a crime. An attorney's exercise of discretion in making tactical decisions regarding trial strategy

must be both reasonable and informed. An informed decision is one made on the basis of reasonable investigation. (*People* v. *Ledesma* (1987) 43 Cal.3d 171, 215.) Although counsel has "wide latitude and discretion . . . that discretion must be a reasonable and informed one in the light of the facts and options reasonably apparent to counsel at the time of trial, and *founded upon reasonable investigation* and preparation." (*People* v. *Frierson* (1979) 25 Cal.3d 142, 166, italics added; see also, *In re Marquez*, *supra*, 1 Cal.4th 584, 606; *In re Fields* (1990) 51 Cal.3d 1063, 1069; *In re Cordero* (1988) 46 Cal.3d 161, 180.) "[Sltrategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness

case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." (*Strickland* v. *Washington* (1984) 466 U.S. 668, 690-691.)

The referee apparently concluded that Agajanian's decision that presentation of a "family sympathy" defense at the penalty phase was preferable to an attempt to offer mitigating evidence was reasonable and justified his failure to undertake any investigation. We need not decide here whether counsel representing a capital defendant must investigate all potential sources of mitigating evidence, including avenues of investigation which counsel has no reason to believe may be fruitful. We assume arguendo that, since Agajanian apparently was put on notice of possible family discord during petitioner's youth, his decision to present a "family sympathy" defense without investigation to determine the nature of the evidence that was available was not a decision that a competent attorney representing a capital defendant would make.

Question 7. No, trial counsel's penalty phase strategy was not affected in any way by the fee arrangement. Petitioner's father had fully paid by way of cash, a $17,000 lien on a personal injury case of his daughter's friend, and some tile work done by the father at counsel's office. The lien proceeds never materialized. There is no indication that counsel withheld any services, investigation or use of experts because of the fee arrangement.

Petitioner objects to this finding on the ground that the delay in retaining Dr. Broussard was attributable to the failure of petitioner's father to respond to Agajanian's demands for money.

The record supports the findings of the referee. While the lien proceeds had not yet materialized and may never have done so, the fee had otherwise been paid. This court's question was in response to petitioner's allegation that counsel suffered from a conflict of interest engendered by the fee arrangement that made it impossible for him to offer evidence that the family was dysfunctional and that petitioner's parents had abused him. The

fee arrangement had nothing to do with the retention of Dr. Broussard and there is nothing in the record to suggest that when Agajanian elected the family sympathy strategy he had any reason to consider engaging another expert.

Petitioner also complains that the referee made other findings she was not asked to make, and did not make any recommendation regarding his entitlement to relief. Because this court has access to and has reviewed the entire record on appeal, and is therefore able to make an assessment of prejudice, the court did not request that a recommendation be made regarding relief. The findings of the referee are broader in some respects than the questions submitted by this court. Nonetheless, as petitioner recognizes, when this court appoints a referee to take evidence and make findings, the findings are not binding on this court which will make an independent review of the evidence and of the referee's resolution of mixed questions of law and fact. Ultimately, therefore, the findings on which resolution of

petitioner's claims depend, are made by this court. The possibly extraneous findings of the referee are irrelevant.

Petitioner also complains that the referee excluded evidence regarding State Bar proceedings which led to the suspension of trial counsel from practice, evidence petitioner asserts was relevant to counsel's credibility, and would have revealed a pattern of indifference and inattentiveness to the needs of his clients. Petitioner fails to identify how any material in those records is relevant to specific questions on which the referee was ordered to take evidence and make findings of fact, however. To the extent that there may be relevance to the ultimate question of whether counsel provided ineffective assistance in the murder prosecution, this court may take judicial notice of the records of this court in the State Bar proceedings (Evid. Code, §§ 452, subds. (c)&(d), 453), and we have granted petitioner's request that we do so.[6/]

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6. Agajanian was first suspended for four years by a July 10, 1990, order in Bar. Misc. 5560. The order was stayed, probation granted, and an actual suspension of two years made a condition of probation. On October 16, 1991, an actual suspension of three years to be concurrent with the former suspension was ordered in a matter in which eight additional complaints relating to matters occurring between 1980 and 1989 were consolidated (see *In re Agajanian,* S022257), and a third suspension was ordered on June 17, 1993, on a finding that probation had been violated. Agajanian resigned from the bar, with additional disciplinary charges pending, on June 30, 1994.

During the time that Agajanian represented petitioner on appeal from this conviction, he filed a 30-page opening brief, purported to adopt the amicus curiae brief filed by counsel from the California Appellate Project, and filed no reply brief. While representing petitioner he was convicted of two counts of criminal contempt (18 U.S.C. § 401(3)) in the United States District Court for the District of Vermont in December 1985. That judgment was affirmed on appeal. (*United States* v. *Agajanian* (2d Cir. 1988) 852 F.2d 56.)

The bases for the disciplinary proceedings that followed the proceeding related to the contempt conviction were complaints that Agajanian had abandoned clients, failed to respond to client communications, made false representations and misrepresentations, lost files, and failed to perform promised services. Evidence was admitted at the evidentiary hearing that during the time he represented petitioner, Agajanian did not respond to client communications, failed to make court appearances, did not visit clients in jail or show up in court or other places as promised, and was distracted by a civil suit against a nonlawyer who shared his office and was accused of fraudulent sales of trust deeds.

Petitioner also complains that the referee prevented inquiry into the relationship between counsel and the trial judge, and into counsel's lack of knowledge of Judge Fitzgerald's past knowledge of petitioner and the judge's comments about

accomplice Hefner. Petitioner argues that this inquiry would have exposed additional evidence of trial counsel's inadequate preparation for trial, including his failure to procure a transcript of the Hefner trial in order to review the testimony of the witnesses at that trial. We find no error or impropriety. Again, the evidence was not related to the specific questions put to the referee. Only disputed issues of fact whose resolution is necessary to disposition of the petition are the subject of the reference order. Counsel's failures in this regard are not disputed issues of fact.

Petitioner also objects to appendices to the referee's report in which she offers comments on some of the evidence, and asks that the comments be disregarded. To the extent that these comments offer insights into the referee's assessment of witness credibility, they may be considered and we have done so where appropriate.

Respondent urges the court to adopt the findings and conclusions of the referee, noting that the referee concluded that

petitioner's family was a paradox. It was dysfunctional, but was also close-knit. Respondent also notes that some of the testimony of petitioner's siblings was inconsistent. They did not all recall the same incidents. Moreover, some offered reasonable explanations for what otherwise appeared to be unreasonable or arbitrary infliction of physical and verbal abuse on the children.

The testimony of the family members was consistent in many respect and their description of chaotic family life is supported by the records compiled much earlier when petitioner was in Youth Authority custody. The experts who relied on those records as well as statements by the siblings concluded that their parents' verbal and physical abuse of the children, and of petitioner in particular, had a marked impact on him and contributed to his use of drugs. However, the evidence also showed that the family was close-knit in many ways - the children who had left the home returned for family dinners on some Sundays and holidays, they visited petitioner while he was

in custody in youth and adult facilities, and all supported one another in times of need.

Moreover, as we discuss below, petitioner's effort to show that if the jury had been made aware that his family background led to his substance abuse and assaultive conduct while under the influence of drugs a different penalty verdict would have been reached is unpersuasive. It is so because the underlying assumption that petitioner committed the assault and murder because he was under the influence of drugs is not supported by either the record in the habeas corpus proceeding or the record on appeal.

V

Relief on Habeas Corpus

A habeas corpus petitioner bears the burden of establishing that the judgment under which he or she is restrained is invalid. (*People* v. *Duvall* (1995) 9 Cal.4th 464, 474.) To do so, he or she must prove by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus. (*People* v.

Ledesma, *supra*, 43 Cal.3d 171, 243.) When the basis of a challenge to the validity of a judgment is constitutionally ineffective assistance by trial counsel, the petitioner must establish either:

(1) As a result of counsel's performance, the prosecution's case was not subjected to meaningful adversarial testing, in which case there is a presumption that the result is unreliable and prejudice need not be affirmatively shown (*United States* v. *Cronic* (1984) 466 U.S. 648, 658-659; *In re Avena* (1996) 12 Cal.4th 694, 726-727); or

(2) Counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome. (*Strickland* v. *Washington*, *supra*, 466 U.S. at p. 694; *In re Avena*, *supra*, 12 Cal.4th at p. 721; *In re Alvernaz* (1992) 2 Cal.4th 924, 936.) In demonstrating prejudice, however, the petitioner must establish

that as a result of counsel's failures the trial was unreliable or fundamentally unfair. *(In re Avena, supra,* 12 Cal.4th at p. 721.) "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland* v. *Washington, supra*, 466 U.S. at p. 686.)

The question we must answer is whether there is a reasonable probability that, but for counsel's errors and omissions, the sentencing authority, would have found that the balance of aggravating and mitigating factors did not warrant imposition of the death penalty. (466 U.S. at p. 696.) While the court must often be deferential to a tactical decision made by criminal defense counsel in order to avoid chilling vigorous advocacy and to avoid second-guessing counsel, we may not abdicate our role in assessing competence.

It is not true, as petitioner asserts, that Agajanian elected the penalty phase strategy of seeking sympathy for petitioner's

family without doing any investigation whatsoever. His examination of the family members who testified at the penalty phase of the trial confirms that he had learned from them before they testified some information regarding petitioner's acts of kindness and generosity and his artistic skill. And, although he described his penalty phase theory as an attempt to elicit sympathy for the family, mitigating evidence was presented through their testimony. Nonetheless, as indicated earlier, we will assume arguendo that counsel's performance in this regard fell below the objective standard of reasonableness under prevailing professional norms demanded as an essential aspect of a criminal defendant's Sixth Amendment right to competent representation.

Notwithstanding Agajanian's multiple failings, however, this is not a case in which there was a total breakdown of the adversarial process within the meaning of *United States* v. *Cronic*, *supra*, 466 U.S. 648. The failure of counsel to present the mitigating evidence petitioner has now identified, or any

specific type of mitigating evidence, does not reflect such a breakdown of the adversarial process as to render the verdict presumptively unreliable. (*People* v. *Bloom* (1989) 48 Cal.3d 1194, 1228, fn. 9; *People* v. *Williams* (1988) 44 Cal.3d 1127, 1152.) And, as we explained in *In re Avena*, *supra*, 12 Cal.4th at page 727, notwithstanding the broad language in the *Cronic* opinion (*supra*, 466 U.S. at p. 659) to the effect that when "counsel entirely fails to subject the prosecutions' case to meaningful adversarial testing," the right to competent counsel has been denied and the result of the trial is presumptively unreliable, the actual application of *Cronic* has been much more limited. Defendants have been relieved of the obligation to show prejudice only where counsel was either totally absent or was prevented from assisting the defendant at a critical stage. Neither factor is present here. In other circumstances, the petitioner must show how specific errors undermined the reliability of the verdict. (*United States* v. *Cronic*, *supra*, 466 U.S. 648; *In re Avena*, *supra*, 12 Cal.4th 694.) Therefore, while

petitioner argues that he is entitled to relief without a showing of prejudice, we conclude that he must satisfy the standards established in *Strickland* v. *Washington*, *supra*, 466 U.S. 668.

As noted earlier, we will assume arguendo that Agajanian failed to afford constitutionally adequate representation because he allegedly (1) failed to investigate and discover mitigating evidence as a result of his ignorance of the types of evidence a jury might consider mitigating; (2) failed to present readily available evidence that would have revealed to the jury the extent to which petitioner was subjected to psychological and physical abuse as a child, the impact the dysfunctional and peripatetic family life had on petitioner's development, and the correlation between these events and petitioner's resort to drugs; (3) failed to prepare, which left him unaware of the scope of the aggravating evidence to be introduced; and (4) delivered an unfocussed closing argument, during which he undercut his client's own case by telling the jury that the evidence of

petitioner's mental and emotional problems was not mitigating, prejudiced petitioner at the penalty phase of the trial.

Is it reasonably probable that the jury would have reached a more favorable penalty phase verdict had Agajanian represented him with greater competence? Petitioner argues that it is, and that without knowledge of petitioner's background the jury was not able to understand and assess his true character and thus could not truly assess his moral culpability. Respondent argues that petitioner has failed to prove prejudice.

In *In re Fields*, *supra*, 51 Cal.3d at pages 1078-1079, we addressed the process by which the court assesses prejudice at the penalty phase of a capital trial at which counsel was, allegedly, incompetent in failing to present mitigating evidence: "What kind of evidentiary showing will undermine confidence in the outcome of a penalty trial that has resulted in a death verdict? *Strickland* [v. *Washington*], *supra*, 466 U.S. 668, and the cases it cites offer some guidance. *United States* v. *Agurs* (1976) 427 U.S. 97, the first case cited by *Strickland*, spoke of

evidence which raised a reasonable doubt, although not necessarily of such character as to create a substantial likelihood of acquittal. (See p. 113, fn. 22.) *United States* v. *Valenzuela-Bernal* (1982) 458 U.S. 858, 873, the second case cited by *Strickland*, referred to evidence which is 'material and favorable . . . in ways not merely cumulative . . . .' In *Strickland* itself the majority found trial counsel's failure to investigate additional mitigating evidence nonprejudicial, citing the weight of the aggravating evidence and the fact that the essence of the mitigating evidence had already been presented to the trier of fact through defendant's own words."

Here, as we have noted, some mitigating evidence was presented in the testimony of petitioner's family members who made the jury aware of the positive aspects of petitioner's character. In addition, petitioner's expert, Dr. Broussard, had testified at the guilt phase that petitioner had a minimal brain injury of a type associated with impulse disorder and learning disorder, and that in his opinion petitioner was in a drug-induced

psychotic state at the time of the offenses and was not completely aware of what he was doing during the robbery and murder. Under the court's instructions, that evidence might have been considered mitigating at the penalty phase even though petitioner's counsel stated in closing argument that because the jury had rejected the guilt phase diminished capacity defense, the evidence was not mitigating.[7]

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7. In reviewing the statutory factors relevant to the penalty decision, Agajanian argued: "And ladies and gentlemen, with respect to diminished capacity, when you ladies and gentlemen returned this verdict of first degree murder and found special circumstances, you indicated to all of us that you did not find diminished capacity.

"So if you did not find diminished capacity, how can I argue that as a factor of aggravation or mitigation. It just does not apply. It's not there.

"I think when you ladies and gentlemen found that - you basically found him guilty of first degree murder and special circumstances, you found that diminished capacity did not reduce the nature of the robbery to something less than a robbery, or the nature of the first degree murder to something less than first degree murder.

"So that's not a factor of mitigation or aggravation. It's just not there at all.

"The age of the defendant. I happen to consider 26 years of age a rather young age, especially to lock a man in a cage for the rest of his life.

"Accomplice, the indication here was that he was not an accomplice or that his participation was minor - exactly the opposite. He is, as the People said, the triggerman."

This argument was made notwithstanding counsel's knowledge that the defense of diminished capacity had been abolished, and there was substantial evidence, including petitioner's confession, that the robbery had been preplanned and that intent to rob existed, both of which would explain the jury's rejection of that defense at the guilty phase. Counsel failed to recognize that the jury could, nonetheless, consider the evidence of organic brain damage associated with lack of impulse control as mitigating.

Petitioner has not shown that Agajanian's failure to prepare to meet or counter the evidence about his assault on Kathy Cusack was prejudicial. He does not suggest that this evidence could have been rebutted. Our principal concern therefore lies in Agajanian's failure to present the additional mitigating evidence about petitioner's family background, the expert testimony about that background, and the expert opinion that petitioner's drug abuse and assaultive conduct while under the influence of drugs, were a product of growing up in a dysfunctional family in which he suffered continual psychological abuse.

We conclude that this omission did not prejudice petitioner. It is not probable that had this evidence been presented a more

favorable result would have resulted at the penalty phase. The aggravating factors were overwhelming. The circumstances of the crime - an execution of one and attempted execution of the other, victims of a preplanned robbery - and the earlier knifing of William Scofield and the pregnant Kathy Cusack as she lay in bed trying to protect her fetus, were devastating. We cannot conclude that it is probable that the jury would have found that the evidence of petitioner's troubled family background itself would have outweighed that aggravating evidence.

Whatever the merit of petitioner's theory that if the jury understood why he was a drug abuser that knowledge might mitigate a crime committed while under the influence of illegal drugs, petitioner failed to establish that the theory had any relevance here. Apart from his trial testimony that he was "a little bit loaded" and the opinion offered by Dr. Broussard at the guilt phase of the trial, there is simply no evidence that petitioner was so affected by drugs that he was not fully aware of what he was doing when he planned and carried out the robbery and

murder of Timothy Dykstra and attempted murder of Michael Wolbert.

The contrary is true. Unlike Dr. Broussard, we have reviewed the videotape of petitioner's post-arrest statement and his subsequent reenactment of the crime. There is no suggestion in the evidence before the jury that petitioner was so affected by drugs that he was unable to think clearly when the crimes were planned or at the time they were carried out. In his statement and reenactment, apart from self-serving attempts to minimize the extent of his own participation in the crimes, petitioner manifested a detailed recollection, not only of the planning stages of the crimes, but also of their commission. Indeed, he testified that he had a "pretty clear" recollection of the events.

Moreover, petitioner testified at trial that he had taken a quarter gram of cocaine before going to pick up his paycheck between 5 and 6 p.m. on the night of the murder and had taken some earlier on that day and on the prior day, but he offered no evidence at trial or in the habeas corpus hearing regarding the

impact of the drug on his reasoning ability except his testimony that the cocaine made him "more wired" and "more spaced out." Cocaine did not make him more alert, but it did make him more "hyperactive." He conceded that he knew exactly what was going on, however, and uncontradicted evidence at trial established that he had the reasoning ability to plan the means by which he and Hefner would lure their victims to Santiago Canyon, with petitioner selecting the location for the robbery in a fairly remote area where he had once been in a county youth camp. He and Hefner selected a place to leave Hefner's car to mislead the victims as to their actual residence. Petitioner apparently selected the site of the crime under the pretense of having to relieve himself.

Michael Wolbert, who was with petitioner from the time the group left Garden Grove until they reached Santiago Canyon, testified that petitioner was not under the influence of drugs. Wolbert testified that during the time he was with petitioner he saw no indication that petitioner was under the influence of

anything. He had heard petitioner speak before and on that evening heard nothing different about his voice. He saw nothing different about the way petitioner walked from the times he had seen petitioner at work. There was nothing in petitioner's face or eyes that was different and nothing to make Wolbert believe petitioner was under the influence of either alcohol or any drug. Wolbert saw petitioner cock the gun each time before petitioner shot Wolbert. Petitioner's actions when he shot Dykstra and Wolbert were not, as petitioner claimed, a sudden, irrational and impulsive reaction to a command by Hefner to shoot the victims.

In short there is no persuasive evidence that these crimes were a product of petitioner's drug abuse. The mitigating evidence that petitioner claims should have been offered did not support that theory and was minimal in comparison with the aggravating evidence. Under the circumstances it is not probable that the jury would have found evidence that petitioner's childhood was troubled or that turned to drugs as a means of escape from an unbearable family situation mitigating or

sufficiently so that the evidence would have affected the jury determination that the aggravating factors outweighed the mitigating in this case. Petitioner has not established that Agajanian's conduct during the penalty phase of the trial "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland* v. *Washington*, *supra*, 466 U.S. at p. 686.)

The order to show cause is discharged and the petition for writ of habeas corpus denied.

BAXTER, J.

WE CONCUR:

GEORGE, C.J.
WERDEGAR, J.
CHIN, J.

COPY

JOHN LOUIS VISCIOTTI ON HABEAS CORPUS

S031247

CONCURRING OPINION BY KENNARD, J.

I agree with the majority that the failure of petitioner's trial counsel to present certain mitigating evidence at the penalty phase of petitioner's capital trial did not prejudice petitioner, and that therefore petitioner is not entitled to habeas corpus relief I write separately to point out certain findings that were made by the referee at the evidentiary hearing and that, in my view, are of particular importance on the question of prejudice.

I find the issue of prejudice to be quite close. After a thorough review of all of the referee's findings and the supporting evidence, however, I am persuaded that petitioner suffered no prejudice from his trial counsel's failings. A referee's factual findings, although not binding on this court, "are given great weight when supported by substantial evidence," because only the referee "had the opportunity to

observe the demeanor of witnesses" in order to assess their credibility. (*In re Marquez* (1992) 1 Cal.4th 584, 603; accord, *In re Hitchings* (1993) 6 Cal.4th 97, 109.) What I consider to be the most pertinent of the referee's findings will appear in the course of the discussion below.

After luring Timothy Dykstra and Michael Wolbert to a remote area of Orange County, petitioner and a cohort robbed them, and petitioner shot them both at close range. Dykstra died, Wolbert survived. Following a jury trial, petitioner was found guilty of the first degree murder of Dykstra, the attempted murder of Wolbert, and the robbery of both. The jury also found the existence of the special circumstance of robbery murder, and it returned a verdict of death. On petitioner's automatic appeal, this court affirmed the death judgment. (*People* v. *Visciotti* (1992) 2 Cal.4th 1.) In this proceeding, petitioner seeks a writ of habeas corpus in this court, asserting ineffective assistance of trial counsel.

Petitioner faults his attorney for not presenting at the penalty phase of the capital trial mitigating evidence of family violence and dysfunction. We ordered an evidentiary hearing on this issue.

After hearing testimony of various witnesses, the referee, Superior Court Judge Eileen C. Moore, found the evidence of family dysfunction to be in conflict. For instance, although some of petitioner's siblings testified at the reference hearing that their parents inflicted physical abuse on each other, and yelled and screamed at each other throughout a long marriage, there was also testimony by family members that the family was warm, loving, and supportive. As to evidence that the family moved between 12 and 18 times during petitioner's childhood, that was countered by evidence that the family displayed many characteristics of stability: the children raised pets, went on family outings and camping trips, learned to play musical instruments, and lived in a clean home where the family regularly had dinner together. With respect to testimony that

some of petitioner's sisters had married in their teens to escape family conflict, there was also testimony that these same sisters would come to the family home to have Sunday dinner and to celebrate birthdays and holidays, and that they would often telephone home.

The referee also found discrepancies in the evidence presented at the reference hearing regarding claims of parental physical abuse of the children, the extent and seriousness of such abuse, and whether petitioner was singled out for such abuse. And with respect to opinions testified to by defense expert witnesses psychiatrist Jay Jackman and social worker Shirley Reece (for instance, that a birth defect corrected before petitioner reached school age had "a colossal and devastating effect" on his self-image, and that petitioner's home environment had caused petitioner's drug use), the referee found their opinions unsupported by the evidence and therefore lacking in "a certain amount" of credibility.

A petitioner seeking habeas corpus relief for ineffective assistance of trial counsel must establish not only that counsel's performance "fell below an objective standard of reasonableness," but also that the claimed deficiencies had a prejudicial effect on the outcome of the trial. (*Strickland* v. *Washington* (1984) 466 U.S. 668, 688, 694.) Prejudice is shown only when it can be said that absent shortcomings in trial counsel's performance there exists "a reasonable probability" that the outcome would have been different. (*Id.* at p. 694.)

Here, because of the conflicting evidence on the issue of family dysfunction, as shown in the referee's findings, presentation of such evidence at the penalty phase of petitioner's capital trial would not have been particularly effective. I see no reasonable probability, given the deliberate and ruthless manner in which petitioner committed the murder, that the jury's verdict of death would have been different had trial counsel pursued the "dysfunctional family" approach instead of, as counsel did, presenting a case in mitigation based on petitioner's relationship

with his loving and supportive family, and asking the jury to spare petitioner's life in consideration of petitioner's family.[1]

KENNARD, J.

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1. To counter the prosecution's penalty phase case, petitioner's trial counsel presented mitigating evidence of petitioner's loving relationship with his family (Pen. Code, § 190.3, subd. (k)) in an effort to persuade the jury not to condemn petitioner to death and, through argument, counsel tried to diminish the significance of aggravating evidence of petitioner's felony convictions and prior acts of violence. I therefore do not share the view of Justices Mosk and Brown that trial counsel failed to subject the prosecution's penalty phase case to "meaningful adversarial testing," which would warrant reversal under *United States* v. *Cronic* (1984) 466 U.S. 648, 659 for ineffective assistance of counsel without a need by petitioner to show prejudice.

C 0 P Y

VISCIOTTI ON HABEAS CORPUS

S031247

DISSENTING OPINION BY MOSK, J.

I dissent.

I continue to adhere to the view that I set out in dissent in *People* v. *Visciotti* (1992) 2 Cal.4th 1, and therefore reiterate it here.

At petitioner's capital trial, at both guilt and penalty phases, his attorney Roger James Agajanian "provided [him] with ineffective assistance in violation of his rights under the Sixth Amendment to the United States Constitution and article 1, section 15, of the California Constitution.

"Agajanian's deficiencies as trial counsel were pervasive and serious. The point is established by the record. . . . Examples of Agajanian's failings are hard to select, each competing with the rest for egregiousness. By way of illustration

only, I note the following. At the guilt phase, Agajanian relied on the defense of diminished capacity. Much to the surprise he expressed at trial, this defense had previously been abolished and rendered a nullity for all relevant purposes. At the penalty phase, Agajanian presented a summation asking the jury to spare [petitioner's] life. The argument he made in support was worthless. . . .

"Agajanian's deficiencies at trial compel this conclusion: his failings resulted in a breakdown of the adversarial process . . . ; that breakdown establishes a violation of [petitioner's] federal and state constitutional right to the effective assistance of counsel; and that violation mandates [vacation] of the judgment even in the absence of a showing of specific prejudice. (See *United States* v. *Cronic* (1984) 466 U.S. 648, 653-662 [speaking of the federal constitutional guaranty only]; *People* v. *Leeds* (1987) 43 Cal.3d 171, 242-245 (conc. opn. of Grodin, J.) [speaking of both the federal and state constitutional guaranties].)

" 'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.' (*Herring* v. *New York* (1975) 422 U.S. 853, 862; accord, *United States* v. *Cronic*, *supra*, 466 U.S. at p. 655.) In other words, 'The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.' (*Polk County* v. *Dodson* (1981) 454 U.S. 312, 318.) It follows that the system requires 'meaningful adversarial testing.' (*United States* v. *Cronic*, *supra*, 466 U.S. at p. 656.) 'When' – as here – 'such testing is absent, the process breaks down and hence its result must be deemed unreliable as a matter of law.' ' (*People* v. *Bloom* (1989) 48 Cal.3d 1194, 1237 (conc. & dis. opn. of Mosk, J.); see *United States* v. *Cronic*, *supra*, 466 U.S. at p. 659; see also *Rose* v. *Clark* (1986) 478 U.S. 570, 577-578 [to similar effect].)" (*People* v. *Visciotti*, *supra*, 2 Cal.4th at pp. 84-85 (dis. opn. of Mosk, J.), fns. omitted.)

In attempting to justify their refusal to set aside the sentence of death – they do not explain their salvaging of the other parts of the judgment – the majority simply assert that Agajanian did *not* provide petitioner with ineffective assistance.

Insofar as it is the law that stands in their way, the majority choose to renounce its substance.

Thus it is with ineffective assistance of counsel under a theory of constructive denial of representation.

The majority follow *In re Avena* (1996) 12 Cal.4th 694, over *United States* v. *Cronic* (1984) 466 U.S. 648. *Avena* tried to deconstruct *Cronic*, but did not, and could not, succeed. (See *In re Avena*, *supra*, 12 Cal.4th at pp. 775-782 (dis. opn. of Mosk, J.).) Notwithstanding *Avena's* sophistry, *Cronic* declares that "[t]he right to the effective assistance of counsel" under the Sixth Amendment is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made

demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." (*United States* v. *Cronic*, *supra*, 466 U.S. at pp. 656-657, fns. omitted.) It follows that, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." (*Id.* at p. 659.) In such a situation, "[n]o specific showing of prejudice [is] required . . . ." (*Ibid.*)

Insofar as it is the facts that stand in their way, the majority try to deny their force.

Thus it is with ineffective assistance of counsel under a theory of incompetent representation.

Such a theory, of course, entails deficient performance by counsel under an objective standard of professional reasonableness. (*Strickland* v. *Washington* (1984) 466 U.S. 668, 687-688 [under U.S. Const., Amend. VI only]; *People* v.

Ledesma (1987) 43 Cal.3d 171, 216 [under both U.S. Const., Amend. VI, and Cal. Const., art. 1, § 15].) It also entails prejudice arising from counsel's deficient performance under a test of reasonable probability of a more favorable outcome. (*Strickland* v. *Washington*, *supra*, 466 U.S. at pp. 687, 693-694 [under U.S. Const., Amend. VI only]; *People* v. *Ledesma*, *supra*, 43 Cal.3d at pp. 217-218 [under both U.S. Const., Amend. VI, and Cal. Const., art. 1, § 15].) But, one must hasten to add, a "reasonable probability" is not a "more likely than not" probability, but simply "a probability sufficient to undermine confidence in the outcome." (*Strickland* v. *Washington*, *supra*, 466 U.S. at pp. 693, 694 [under U.S. Const., Amend. VI only]; see *People* v. *Ledesma*, *supra*, 43 Cal.3d at p. 218 [under both U.S. Const., Amend. VI, and Cal. Const., art. 1, § 15].)

The majority do not seriously dispute that Agajanian's performance – or better, nonperformance – at the penalty phase was deficient. Nor could they. Res ipsa loquitur.

Instead, the majority claim that from Agajanian's deficient performance at the penalty phase no prejudice arose. The mitigating evidence of petitioner's background and character, which was readily available but was not introduced at trial, was extensive and of substantial weight. The majority assert that this evidence would not have justified or excused his crimes. Obviously not. Even petitioner himself concedes the point. The fact remains, this evidence would have humanized him and hence would have helped explain how he was led to commit his crimes – and might well have gained him life imprisonment without possibility of parole instead of death. I do not overlook the aggravating evidence. Not at all. But I recognize, as the majority refuse to, that even substantial aggravating evidence does not compel the ultimate sanction. (See, e.g., *People* v. *Von Villas* (1992) 11 Cal.App.4th 175 [life imprisonment without possibility of parole for each of two police officers who conspired to commit, and did commit, a murder for hire]; *People* v. *Scott* (1991) 229 Cal.App.3d 707 [life imprisonment without

possibility of parole for a defendant who, with others, developed and carried out a plan to rob the residents of a house and leave no witnesses, resulting in four murders]; *People* v. *Talamantez* (1985) 169 Cal.App.3d 443 [life imprisonment without possibility of parole for a defendant with several prior felony convictions who went "nigger hunting" and proceeded to kidnap, torture, and murder an African-American victim].)

For the reasons stated above,[1/] I would vacate the judgment in its entirety.

MOSK, J.

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1. Which I am confident the United States District Court for the Central District of California will find persuasive when it considers petitioner's soon-to-be-filed petition for writ of habeas corpus.

C 0 P Y

VISCIOTTI ON HABEAS CORPUS

S031247

DISSENTING OPINION BY BROWN, J.

I respectfully dissent.

Relying on this court's recent decision in *In re Avena* (1996) 12 Cal.4th 694, 726-728, the majority concludes that notwithstanding the "multiple failings" of petitioner's trial counsel, Roger Agajanian, this is not a case in which there was a total breakdown of the adversary process within the meaning of *United States* v. *Cronic* (1984) 466 U.S. 648 (hereafter *Cronic).* (Maj. opn., *ante,* at pp. 34-35.) According to the majority, "[d]efendants have been relieved of the obligation to show prejudice only where counsel was either totally absent or was prevented from assisting the defendant at a critical stage." (*Id.*, at p. 34.) In my view, this reading of *Cronic* is inconsistent

with both the express language of the high court's opinion and the application of that opinion by other courts.

In *Cronic,* the United States Supreme Court observed that although courts ordinarily "presume that the lawyer is competent to provide the guiding hand that the defendant needs, ... [t]here are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a, particular case is unjustified." (*Cronic*, *supra*, 466 U.S. at p. 658.) The court offered examples of *two* such circumstances. The first circumstance was "the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." (*Id.*, at p. 659, fn. omitted.) In a footnote elaborating on this first circumstance, the court noted that it had "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. [Citations]" (*Id.*, at p. 659, fn. 25.) The court then

identified a second circumstance in which a showing of prejudice is not required, stating that "[s]imilarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." (*Id.*, at p. 659.) It is apparent from even a cursory reading of *Cronic* that the footnote the majority now seizes on to limit the *Cronic* holding has nothing whatsoever to do with the circumstance in which "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing . . . ." (*Ibid.)* Nor has "the actual application of *Cronic* been much more limited." (Maj. opn., *ante,* at p. 34; see generally, *In re Avena, supra*, 12 Cal.4th at pp. 777-782 (dis. opn. of Mosk, J.) [federal and state cases applying *Cronic*].) As Justice Mosk previously recognized, "[t]he devil may often be in the details, but the rule of *Cronic* is not in its footnotes." (*Id.*, at p. 776 (dis. opn. of Mosk, J.).)

The rationale for requiring reversal when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing" (*Cronic*, *supra*, 466 U.S. at p. 659) is one of institutional integrity. " '[T]ruth,' Lord Eldon said, 'is best discovered by powerful statements on both sides of the question.' This dictum describes the unique strength of our system of criminal justice. 'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.' *Herring* v. *New York*, 422 U.S. 853, 862 (1975). It is that 'very premise' that underlies and gives meaning to the Sixth Amendment. It 'is meant to assure fairness in the adversary criminal process.' *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Unless the accused receives the effective assistance of counsel, 'a serious risk of injustice infects the trial itself.' *Cuyler* v. *Sullivan*, 446 U.S. [335,] 343 [(1980)]. [¶] Thus, the adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the

role of an advocate.' *Anders* v. *California*, 386 U.S. 738, 743 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted–even if defense counsel may have made demonstrable errors–the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: 'While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.' *United States ex rel. Williams* v. *Twomey*, 510 F.2d 634, 640 (CA7), cert. denied *sub nom. Sielaff* v. *Williams*, 423 U.S. 876 (1975)." (*Cronic*, *supra*, at pp. 655-657, fns. omitted.)

The penalty phase proceedings against petitioner, the subject of this court's order to show cause, are a textbook example of a process gone awry. Simply put Agajanian failed

petitioner at *every* stage of the proceedings. I offer several of many, many examples that could be given.

During his pretrial preparation, Agajanian "did not send for the police report [of the Cusack incident] or go through the prosecutor's file to read it in advance of trial and thus was surprised and unprepared to face that [aggravating] evidence." (Maj. opn., *ante,* at p. 17.) Likewise, he "failed to investigate and discover mitigating evidence as a result of his ignorance of the types of evidence a jury might consider mitigating." (*Id.*, at p. 35.)

During the penalty phase of the trial itself, Agajanian "failed to present readily available evidence that would have revealed to the jury the extent to which petitioner was subjected to psychological and physical abuse as a child, the impact the dysfunctional and peripatetic family life had on petitioner's development, and the correlation between these events and petitioner's resort to drugs." (Maj. opn., *ante,* at p. 35.) Also during the penalty phase of the trial, Agajanian "delivered an

unfocussed closing argument, during which he undercut his client's own case by telling the jury that the evidence of petitioner's mental and emotional problems was not mitigating." (Ibid.)

During the direct appeal, "the sole act of any significance that [Agajanian] performed on behalf of [petitioner] over the course of almost seven years of representation before this court was the filing of a single thirty-page brief raising only two insubstantial penalty claims." (*People* v. *Visciotti* (1992) 2 Cal.4th 1, 84, fn. 2 (dis. opn. of Mosk, J.); see also maj. opn., *ante,* at p. 30, fn. 6.) Thankfully, at this stage, Agajanian was suspended from the practice of law; not surprisingly, this case had not been his only misstep. (Ibid.)

Even after Agajanian was replaced by new counsel, however, he continued to fail petitioner. During the evidentiary hearing on this petition, Agajanian was less than candid regarding his decision to rely on a family sympathy defense. (See maj. opn., *ante,* at pp. 11-12, fn. omitted ["[I]n none of his self-

described successful presentations of a family sympathy defense in prior cases was family sympathy evidence relevant to any issue in the case and in none could the effort be accurately described as 'successful.' "]; *id.*, at p. 13 ["Agajanian testified that he had no information about petitioner's family when he made his decision on penalty phase tactics. That testimony was contradicted by his expert, Dr. Louis Broussard, who testified that Agajanian told him that there was some 'brutality' in the family."].)

In the context of the penalty phase of the trial, it is clear that Agajanian "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." (*Cronic*, *supra*, 466 U.S. at p. 659.) This court had it all wrong when, on direct appeal, it characterized Agajanian's penalty phase closing argument as "a rambling discourse, not tied to particular evidence." *(People* v. *Visciotti*, *supra*, 2 Cal.4th at p. 82, fn. 45.) In fact, during the course of the so-called "rambling discourse," Agajanian systematically conceded nine of the eleven aggravating and

mitigating factors set forth in Penal Code section 190.3 (section 190.3) to the prosecution.

Agajanian conceded "[t]he facts and circumstances of the case in my opinion do not have to be reviewed. [¶] There is no way to make light of those tapes of things just like there's no way to make light of any kind of murder, whether or not there's a robbery involved . . . ." (§ 190.3, factor (a).) He conceded "past violence" was a factor in aggravation. (§ 190.3, factor (b).) He conceded "[w]ith respect to the prior conviction for assault with a deadly weapon, there's no way to make light of that either." (§ 190.3, factor (c).) He conceded "[w]ith respect to emotional disturbance, there's no evidence of that. That isn't even a factor to be considered." (§ 190.3, factor (d).) He conceded "[w]ith respect to the next one . . . victim participated or consented. That's not applicable. There's no evidence of that." (§ 190.3, factor (e).) He conceded "same situation" with respect to justification. (§ 190.3, factor (f).) He conceded "[e]xtreme duress, there was no evidence of that either.

Although defense lawyers would like to have that present it's not fair." (§ 190.3., factor (g).) He conceded "with respect to diminished capacity, when you ladies and gentlemen returned this verdict of first degree murder and found special circumstances, you indicated to all of us that you did not find diminished capacity. [¶] So if you did not find diminished capacity, how can I argue that as a factor of aggravation or mitigation? It just does not apply. It's not there."[1] (§ 190.3, factor (h).) And he conceded "the indication here was that [petitioner] was not an accomplice or that his participation was minor -- exactly the opposite. [Petitioner] is, as the People said, the trigger man." (§ 190.3, factor (j).)

Certainly, as the majority states, "[t]he aggravating factors were overwhelming" and the mitigating factors were "minimal in comparison." (Maj. opn., *ante*, at pp. 38, 40.) Even in such

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1. During the guilt phase of the trial, Agajanian had erroneously attempted to rely on diminished capacity, which had been abolished as a guilt phase defense over a year earlier in a widely publicized initiative measure. (*People* v. *Visciotti*, *supra*, 2 Cal.4th at p. 56 & fn. 23.)

a case, though, counsel must hold the prosecution to its heavy burden. (*Cronic*, *supra*, 466 U.S. at pp. 656-657, fn. 19.) Agajanian did not rise to the occasion. Although his abortive attempts to construct a family sympathy defense exposed some of the mitigating evidence to the jury, Agajanian undermined its effectiveness by "conceding that the jury could find that all of the possibly aggravating factors were present and none of the mitigating." (*People* v. *Visciotti*, *supra*, 2 Cal.4th at p. 66, fn. 35.) Indeed, the referee specifically found, and the majority agrees, that Agajanian "had no intention of introducing any evidence in an attempt to draw sympathy to his client." (Maj. opn., *ante*, at p. 26.)

" '[W]ith respect to the process of sentencing from among that class [of defendants who have already been found eligible for the death penalty] those defendants who will actually be sentenced to death, "[w]hat is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime. ["] [Citation.] It is not simply a

finding of facts which resolves the penalty decision, " 'but . . . the jury's moral assessment of those facts as they reflect on whether the defendant should be put to death . . . .' " ' [Citation.] Consideration of statutory aggravating and mitigating factors as part of the jury's normative function of determining the appropriate punishment is, therefore, distinguishable from the factual determination made when the jury finds that a special circumstance allegation is true." (*People* v. *Visciotti*, *supra*, 2 Cal.4th at p. 74.)

Agajanian's abysmal across-the-board performance rendered the penalty phase of the trial a complete and utter farce. Under these circumstances, this court can have no confidence that the jury was actually able to perform its normative function of determining the appropriate punishment. "[T]here has been a denial of Sixth Amendment rights that makes the adversary process itself *presumptively unreliable*." (*Cronic*, *supra*, 466 U.S. at p. 659, italics added.) Therefore, I would grant petitioner

a new penalty phase trial without requiring a specific showing of prejudice.

BROWN, J.

I CONCUR:

MOSK, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Unpublished Opinion
Original Appeal
Original Proceeding XXX
Review Granted
Rehearing Granted

Opinion No. S031247
Date Filed: December 9, 1996

Court:
County:
Judge:

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APPENDIX E

APPENDIX E

[Filed March 12, 1992]

THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,	)	
	)	
Plaintiff and Respondent,	)	
	)	
v.	)	S004597/Crim. 23385
JOHN LOUIS VISCIOTTI,	)	(Super. Ct.
	)	No. C-50770)
Defendant and Appellant.	)	
	)	

Defendant was convicted by a jury in the Orange County Superior Court of the November 8, 1982, first degree murder (Pen. Code, §§ 189, 187)[1] of Timothy Dykstra (count I); attempted murder (§§ 664/187) of Michael Wolbert (count II); and robbery (§ 211) of those victims (count III). The jury also found that the murder was committed under the special circumstance of murder in the commission of robbery (§ 190.2, subd. (a)(17)(i)), and that defendant had personally

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1. All statutory references herein are to the Penal Code unless otherwise indicated.

(SEE DISSENTING OPINION)

used a firearm in the commission of the offenses (§ 12022.5). The same jury found that the killing of Dykstra was intentional and returned a penalty verdict of death.

After denying defendant's automatic application for modification of the penalty (§ 190.4), the judge imposed a sentence of death for the murder, a consecutive term of nine years with a two-year enhancement for the attempted murder, and a stayed (§ 654) term of one year with an eight-month enhancement for the robbery.

This appeal is automatic. (§ 1239, subd. (b).)

Having concluded that no prejudicial error affected the determination of guilt or penalty, we shall affirm the judgment in its entirety.

I

A. The Prosecution Case.

The evidence, based in major part on the testimony of Michael Wolbert, and on defendant's confessions, established the following.

Defendant and Brian Hefner, both of whom had been employed as burglar alarm salesmen by Global Wholesalers in Garden Grove, and who shared a motel room, were fired by their employer on November 8, 1982. Because their final paychecks were insufficient to cover future rent, they devised a plan to rob fellow employees who were also to be paid on that date. The pair waited in the company parking lot until another group of employees, among whom were Dykstra and Wolbert, returned from their shifts. They invited Dykstra and Wolbert to join them at a party which, they claimed, was to be held at the home of friends in the Anaheim Hills area.

Dykstra and Wolbert agreed to go to the party. They did not know defendant and Hefner well, however, and were cautious. They insisted on driving in Wolbert's car. They also removed most of their cash from their wallets and hid it behind the dashboard of their car. After leaving defendant's car at an apartment complex, the four drove to a remote area on Santiago Canyon Road where defendant asked Wolbert to stop so that

defendant could relieve himself. It was then between 7 and 9 p.m.

All four men left the car, Dykstra getting out first to permit defendant to leave. After the other three men left the car, Wolbert saw a gun in defendant's waistband. Wolbert then left the car and when he next looked at defendant saw that defendant and Dykstra were standing face-to-face about two feet apart, with defendant holding the gun pointed at Dykstra. Defendant demanded the victims' wallets. Wolbert told him where the money was hidden. Dykstra and Wolbert then stayed on an embankment, several feet apart, while Hefner searched for the money.

Defendant moved over to stand by Wolbert, who asked defendant to let them go, told him to take the car and the money, and assured him that he would not identify him. When Hefner left the car, defendant moved back toward Dykstra who was sitting down. Defendant then raised the gun in one hand and shot Dykstra from a distance of about three or four feet. The

bullet passed through the pericardial sac, grazing Dykstra's heart, and entered his right upper lung, causing death by exsanguination, i.e., blood loss.

After defendant shot Dykstra, Wolbert stood up and stepped back. Defendant approached Wolbert, who was backing up, raised the gun in both hands, and shot Wolbert three times. Wolbert was struck first in the torso and fell down. Defendant came closer and from a distance of about three feet shot Wolbert in the left shoulder. As defendant began to walk away Wolbert got up and began to approach defendant. Defendant turned, held the gun close to Wolbert's head and shot him in the left eye, at which point Wolbert fell down again. Wolbert saw defendant pull the hammer of the gun back before each shot.

In spite of his life-threatening wounds, Wolbert did not lose consciousness. He heard defendant and Hefner get into the car and drive back down the road. He was later able to attract the attention of passersby who summoned aid. He identified his assailants as fellow employees at Global Wholesalers. Dykstra

was dead when paramedics arrived. Wolbert was transported to the hospital where he underwent surgery. On the following morning, he identified both defendant and Hefner in a photographic lineup, identifying defendant as the person who had shot him and Dykstra.[2/]

Defendant and Hefner were arrested as they left their motel room about 9 a.m. on the morning after the robbery and murder. The murder weapon, a .22-caliber single action revolver which still held six expended shell cases in the cylinder, was found hidden in a space behind the bathroom sink. Defendant confessed his involvement and, at the request of the investigating officers, participated in a videotaped reenactment of those events that had taken place in Santiago Canyon.

Analysis of a sample of defendant's blood, taken at approximately noon on November 9, 1982, revealed no alcohol, amphetamines, opiates, barbituates, or phencyclidine (PCP).

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2. Hefner was tried separately, convicted of the same offenses, and sentenced to life in prison without possibility of parole. The People die not seek the death penalty for Hefner.

Cocaine and benzoylecgonine, a metabolite of cocaine, were present, however.[3/]

B. The Defense Case.

Defendant attempted to establish that his actions on November 8, 1982, were the product of, or influenced by, his ingestion of drugs and that he did not intend to kill Timothy Dykstra. At the time of the offenses defendant was 25 years old.[4/] He testified that he had used drugs since the age of 12, among them marijuana, barbituates, amphetamines, cocaine, PCP, LSD, and heroin. He had first been arrested on a drug-related charge in 1975 when he sold "speed" to an undercover agent. In 1981 he was found guilty of vandalism after becoming involved in a fight while drinking. He had been committed to the Youth Authority after three escapes from county juvenile facilities.

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3. All alcohol and drug tests of Dykstra's blood were negative.

4. Defendant testified that Hefner was younger. He was not sure of Hefner's age, but believed him to have been 19.

In 1978, he pleaded guilty to a charge of assault with a deadly weapon, and was sentenced to state prison. On the night of the stabbing incident that led to that conviction he had used marijuana and PCP. That incident occurred in the same motel at which he was living when arrested on November 9, 1982. It was, he testified, a hangout for drug addicts and prostitutes.[5]

Brian Hefner had owned both a .22-caliber rifle and the revolver, but defendant persuaded him to pawn the rifle to obtain

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5. In his guilt phase testimony, defendant claimed that the 1978 incident occurred when two men who had a problem with his roommate, Doug Favello, kicked in the door of the apartment he shared with Favello, ran in, and cut Favello's throat. A third person with a gun remained at the door. Defendant testified that he picked up the knife dropped by the person who had stabbed Favello, ran after the fleeing intruders, and stabbed the one who had slashed Favello's throat just as that person (Scofield) was trying to enter his own room.

On cross-examination defendant conceded that he and several friends went to Scofield's room later that night, denied that they had kicked in the door to that room or that anyone had been in bed in the room, and denied seeing, let alone stabbing, a woman who had been in the room. Evidence was offered by the People during the penalty phase to establish that Favello had not been injured during the initial confrontation, that defendant and others had broken into the room occupied by Scofield and his friend Kathy Cusack, and that defendant had stabbed Cusack several times.

money with which to buy cocaine. Hefner refused to pawn the revolver, but defendant was not aware that Hefner had the revolver with him on November 8, 1982, when the pair decided to find someone to rob. They had abandoned a plan to obtain money by selling sugar as cocaine, and Hefner had suggested that they find someone to go with them to buy cocaine, take the victims' money under that pretense, and "just split." They invited Dykstra and Wolbert to a party at which there would be girls and cocaine, but were unsuccessful in an attempt to get Dykstra and Wolbert to provide money with which to buy cocaine. Defendant and Hefner then decided to simply take them somewhere and take their money. Defendant alone decided where to take the victims and gave Wolbert directions to Santiago Canyon, which was an area to which he had been when committed to a county boys ranch.

Hefner's car was left at an apartment complex in the hope that Dykstra and Wolbert would believe that defendant and Hefner lived in that complex. and Wolbert would believe that

defendant and Hefner lived in that complex. They went to Santiago Canyon so that defendant and Hefner would have time to get away before their victims made it back to town to look for them at the apartment complex. Defendant's intent was only to take the victims' money, not to kill them.

When Hefner told defendant at the Global Wholesalers warehouse that he had brought the gun to protect himself in case anything went wrong, defendant told him to leave it. Hefner put the gun behind the heater in his car. Defendant did not know that Hefner brought the gun with him when the pair transferred to Wolbert's Camaro for the drive to Santiago Canyon.

Defendant testified that he did have to relieve himself when he asked that the car stop. He had planned to take Dykstra and Wolbert farther back in the canyon so that it would take them a long time to come back out. When the car stopped, Hefner got out behind defendant, handed the gun to him, and said, "let's take their money now." Defendant took the gun, held it on the victims, but, he claimed, it was Hefner who demanded their

money. After Hefner had gathered up the money, defendant began, to back up to get into the car to leave. The victims had not resisted. Wolbert told him to go ahead and take the car, just leave.

At that point, however, Hefner said: "Don't let them go because they'll tell," and yelled at defendant to shoot them. Defendant testified that he did not know what happened then except that he started shooting. He shot until the gun was empty. He had not loaded the gun and did not know how many shells were in it. He did not know whether he used one hand or two. He had no idea where he was firing the gun. He did not intend to shoot anyone through the heart or in the side, and was not aiming there. Dykstra had not made any threatening move prior to being shot, but Wolbert stood up and came running toward him. Defendant did not know at that point that Wolbert had been hit by the prior shots. Earlier Wolbert had shown defendant a "weapon" -- a glove with metal lining -- that Wolbert said he carried in case there was "trouble." Defendant did not know he

shot Wolbert in the face, but admitted that he had pulled the trigger and was pointing the gun at Wolbert.

At the time of these events defendant was "a little bit loaded." Prior to the incident he had injected himself with cocaine,[6] as he had been doing on a daily basis. He had not worked on November 8 because he was "loaded." Because he had been injecting cocaine he had been up for two days before that. The cocaine made him more "wired" and "spaced out." On his return to the motel after the robbery/murder, in which he and Hefner had obtained about $70, he paid the rent and bought a quarter-gram of cocaine from a friend who lived nearby. He and Hefner used that cocaine at the friend's house, and during the evening purchased two more quarter-grams.

Defendant insisted that although the robbery was planned he had not planned to kill anyone, had not thought it over, and had not considered the consequences of what might happen if he did kill someone.

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6. Defendant had told police that he was "loaded up on crank," or methamphetamine.

Defendant presented expert testimony of forensic psychologist, Dr. Louis Broussard, that defendant had minimal brain injury of a type associated with impulse disorders and specific learning disorders. The learning disorder had caused achievement problems in school, problems that had not been remediated, and as a result his academic achievement was less than it might otherwise have been. Based on the expert's examination and testing of defendant, his review of defendant's confessions and the videotaped reenactment, interviews with family members, and the laboratory tests of defendant's blood, Dr. Broussard believed that defendant was not completely aware of what he was doing during the robbery/murder and could not judge the nature and consequences of his acts at that time.

Dr. Broussard also described the effects of prolonged use of cocaine, which resulted in some users becoming "ambulatory psychotics," having persecutory delusions similar to those of a person getting over acute schizophrenia, and experiencing hallucinations. Dr. Broussard had concluded that defendant was

in a drug-induced psychotic state at the time of the events, could not and did not premeditate and deliberate, and was not in control of his senses when he agreed after his arrest to the police interview without counsel. Dr. Broussard also believed that when defendant responded to Hefner's command to shoot, he was behaving like a sleepwalker or person under hypnosis. His behavior was chaotic and drug controlled.

C. Penalty Phase.

1. Aggravating Evidence.

The only evidence presented by the People in the initial phase of the penalty trial was the testimony of William Scofield, the victim of the June 15, 1978, assault with a deadly weapon offense to which defendant had pleaded guilty and for which he had served a prison term. Scofield testified that five or six men, including defendant, broke into the hotel room he was sharing with his friend Kathy Cusack. The other men beat him with sticks and baseball bats, dragged him out of the room, and attempted to throw him from the balcony. Defendant came out

of the room and stabbed Scofield in the lower back. The wound required stitches. The events occurred on the day after Scofield had an argument and fight with another tenant who, allegedly, had lost a cat belonging to Cusack. Other persons present during that exchange were armed with knives, but no one was stabbed then.

The People sought to present the testimony of Cusack that during the June 15 incident defendant had also stabbed her. Defendant's objection that the pretrial notice of aggravating factors given by the prosecution, which referred only to the assault on Scofield, was not broad enough to give notice that evidence of the assault on Cusack would be offered was sustained and she did not testify at this stage of the penalty trial. (See § 190.3.) The court rejected the People's arguments that the assault on Cusack was so closely related to the assault on Scofield that it was among the circumstances of the latter, and that because defendant had been charged with both assaults, notice that evidence of one would be offered was adequate.

Cusack was permitted to testify in rebuttal to the mitigating evidence presented by defendant. She first met defendant on June 12, 1978, at a party in defendant's apartment. She had not seen him again until the early morning hours of June 15 when he and several other men broke into the apartment she shared with Scofield. Defendant had a knife. When the other men, who were beating Scofield with bats and sticks, dragged Scofield out of the room, defendant remained in the room where Cusack was standing on the bed. He stabbed her through the right forearm, which she had raised to protect herselff stabbed her farther up that arm, and when she fell down onto the bed, slashed her leg. He then stabbed her in the ankle. When defendant attempted to stab Cusack in the abdomen she told him she was pregnant.[7] He nonetheless tried again to stab her in the abdomen, but she rolled over and he stabbed her in the side. He then stabbed her in the chest, slashed her shoulder, stabbed her in the area of her breast. After stabbing Cusack eight or more times, defendant

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7. Cusack testified that she was, in fact, four months pregnant.

began to carve up the walls of the apartment, and to cut up the posters and pictures. When Cusack hit him over the head with a stick, defendant ran out of the apartment. She, too, had to be hospitalized for treatment of her wounds.

2. Mitigating Evidence.

Defendant was one of nine children. His sisters Lisa, then 15 years old, Rose, 20, Antoinette, 31, and Ida, 33, his brother Louis, 24, and his parents all testified regarding defendant's love and concern for family, his willingness to assist and counsel his siblings, his musical and artistic talent, and the change in his personality when under the influence of drugs. All agreed that drugs were defendant's biggest problem, and testified that he was violent only when under the influence of drugs.

Defendant's father became aware of the drug problem several years before the trial. On the first occasion that defendant came home "loaded," his father "punched him clear across the room." Thereafter his father tried to bribe him and to find employment for him, in an effort to get him off drugs.

Defendant had never been violent toward anyone in the family, and when not under the influence of drugs was "one of the nicest kids you can ever meet." He attended all family gatherings, ran errands and did favors for his parents, and never refused their requests. The violent acts about which testimony had been offered were uncharacteristic of defendant.

Christine, defendant's girlfriend for two and one-half years, described his manner with her children as "fantastic," testified that he was very helpful both with household tasks and with car repairs, and characterized defendant as a very loving, caring, gentle, and considerate person who treated her and her children with respect.

II

COMPETENCY

Relying on People v. Hale (1988) 44 Cal.3d 531, and People v. Marks (1988) 45 Cal.3d 1335, defendant argues that the trial court lacked jurisdiction to proceed to trial because the judge had expressed a doubt as to defendant's competency and

had initiated proceedings under section 1368 to determine competency, which proceedings were never held.

We disagree with the initial premise that the court expressed doubt as to defendant's competence and had ordered that proceedings be conducted pursuant to section 1368.

Defendant relies solely on the court's response to his motion for the appointment of experts "under [Evidence Code section] 730 with respect to an examination of Mr. Visciotti on the criteria of 1026 and 1368." The court granted the motion, orally stating only that the experts would "be requested to conduct the examination based on 1026 and 1368."[8] The May

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8. The entire colloquy is set out below:

"MR. AGAJANIAN [defense counsel]: Your Honor, there's one other matter I'd like to address the court on. I'd like to make a motion under 730 with respect to an examination of Mr. Visciotti on the criteria of 1026 and 1368 and ask it be kept confidential. I'd ask two doctors be appointed.

"THE COURT: All right. Do you have any preference for any doctors?

"MR. AGAJANIAN: I would request Dr. Seawright Anderson.

"MR. GOETHALS [deputy district attorney]: And I told Mr. Agajanian I'd ask for Dr. Sharma.

"THE COURT: All right. Doctors Seawright Anderson and Dr. Sharma will be appointed pursuant to section 730 of the

2, 1983, form order of appointment signed by Judge Franks in department 38 recited, however: "IT APPEARING TO THIS COURT that defendant's status may fall within the definition set forth in the appropriate statute indicated below" and had check marks on the four lines adjacent to the statutory bases for appointment, sections 1026 and 1368, and Evidence Code sections 730 and 1017. The order set a hearing date of June 20, 1983, in department 38, and ordered the reports of the experts delivered to that department.

Counsel for defendant did not appear on June 20 and no hearing was held. The prosecutor represented that defendant's attorney had advised him a week earlier of a conflicting commitment, and that the two had never agreed on what was to be heard on the day set for the hearing. The case was put over to June 23, at which time it was called in before another judge in a different department. Competence was never mentioned during

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Evidence Code, and will be requested to conduct the examination based on 1026 and 1368, and the results of those to be confidential."

defendant's June 23 appearance or in any subsequent proceeding, and no psychiatric reports by the appointed experts are in the record.

This record does not suggest that the judge intended to express a doubt as to defendant's competence, or that he intended to initiate proceedings to determine competence. Section 1368 provides that if a doubt as to a defendant's competence arises in the mind of the judge, the judge "shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent." If the attorney then informs the court that he or she believes the defendant is or may be incompetent to stand trial, the court is required to order a hearing to determine the question.

It is apparent from this record that counsel's request for appointment of experts for the dual purpose of assisting counsel in making a decision on whether to enter a plea of not guilty by reason of insanity and to render an opinion on defendant's

competence was preliminary to consideration by counsel, let alone the judge, of whether either had a doubt as to defendant's competence. Neither counsel nor the judge expressed a doubt as to defendant's competence and the judge did not order section 1368 proceedings. The typed recital in the form order to the effect that the defendant "may fall within the definition set forth in the appropriate statute indicated above" reflects nothing more than an explanation or justification for the appointment of the experts.[9] It is not the statement contemplated by section 1368 that the court presently has a doubt as to the defendant's competency.[10] (Cf. People v. Westbrook (1964) 62 Cal.2d 197, 203 [criminal proceedings suspended and cause transferred to

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9. Evidence Code section 730 authorizes the appointment of experts when it appears to the court that "expert evidence is or may be required by the court or by any party to the action."

10. Defendant does not argue that he was incompetent or that it appears as a matter of law from the record that he was incompetent, thus obligating the court to order a section 1368 hearing. (Cf. People v. Gomez (1953) 41 Cal.2d 150.) He seeks reversal only on the ground that the court expressed doubt as to his sanity and did order such a hearing.

"psychiatric department," an order that could only be explained by the court having a doubt as to the defendant's sanity].)

In Hale, by contrast, the court expressed a doubt as to the defendant's competence based on the defendant's conduct and demeanor in the courtroom, inquired of counsel, who agreed that in his opinion the defendant was not competent, and ordered a hearing "on the question of the defendant's present mental competency." (People v. Hale, supra, 44 Cal.3d 531, 535-536.) Similarly, in People v. Marks, supra, 45 Cal.3d 1335, the trial court had stated a doubt as to the defendant's mental competence and had ordered "the question of his mental competence to be determined in a special hearing which will be held pursuant to Sections 1368.1 and 1369 of the Penal Code." (Id., at p. 1338.)

III

JURY SELECTION ISSUES

Defendant claims that the jury selection process denied him his rights under the Sixth and Fourteenth Amendments to the United States Constitution, and article I, section 16 of the

California Constitution, to a randomly selected, representative jury; that the use of case specific hypothetical voir dire questions to "indoctrinate" potential jurors was prejudicial misconduct that resulted in a biased jury; that Witherspoon-Witt error (Witherspoon v. Illinois (1968) 391 U.S. 510; Wainwright v. Witt (1985) 469 U.S. 412) occurred when prospective juror Rokes was excused; that three jurors who admitted bias in favor of the death penalty were improperly allowed to remain on the venire panel; and that the trial court erroneously permitted jury selection proceedings to be conducted in his absence. We address each claim in turn.

A. Representative Jury -- Random Selection.

Appellant contends first that the procedure by which the judge, with the acquiescence of counsel, filled the jury box to initiate the general voir dire following the sequestered Hovey death-qualification voir dire (see Hovey v. Superior Court (1980) 28 Cal.3d 1, 80-81) denied him a randomly selected jury.

Random selection, he contends, is mandated by statute and constitutional command, and may not be waived by counsel.

Defendant analogizes jury selection to the status of jury trial itself prior to the 1928 amendment of the California Constitution which for the first time permitted waiver of the right to jury trial. Even under the present article I, section 16, trial by jury in criminal cases is not simply a right of the defendant. It may not be waived unless both the People and the defendant agree.[11] Because random selection, too, is not simply a right of the defendant but is a state-mandated procedure, it may not be waived.

This court rejected a similar argument in People v. Johnson (1894) 104 Cal. 418, 419, where we held that a claim of error based on an irregularity in the seating of jurors who had been selected from those regularly drawn had been waived by the

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11. Article I, section 16 of the California Constitution: "Trial by jury is an inviolate right and shall be secured to all, . . . A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. . . ."

defendant's failure to object. Here, too, counsel acquiesced in the procedure of which defendant now complains. Since our decision in Johnson, however, the Legislature has made it clear that random selection is a firm policy of the State of California.

Section 1046 directs that juries be formed for criminal trials "in the same manner as trial juries in civil actions." Code of Civil Procedure section 197 provided at the time of this trial: "It is the policy of the State of California that all persons selected for jury service shall be selected at random from a fair cross section of the population of the area served by the court, and that all qualified persons have the opportunity, in accordance with his chapter to be considered for jury service in the state and an obligation to serve as jurors when summoned for that purpose. This chapter applies to all trial juries in all civil and criminal proceedings in all courts."

Code of Civil Procedure section 191 now states the policy: "The Legislature recognizes that trial by jury is a cherished

constitutional right, and that jury service is an obligation of citizenship.

"It is the policy of the State of California that all persons selected for jury service shall be selected at random from the population of the area served by the court; that all qualified persons have an equal opportunity, in accordance with this chapter, to be considered for jury service in the state and an obligation to serve as jurors when summoned for that purpose; . . ."

People v. Johnson, supra, 104 Cal. 418, was decided prior to the enactment of Code of Civil Procedure sections 191 and 197. We have not had occasion since the enactment of those sections to consider whether the establishment of random selection as a policy of the state affects the rule applied in Johnson. We conclude that it does not. While the parties are not free to waive, and the court is not free to forego, compliance with the statutory procedures which are designed to further the policy of random selection, equally important policies mandate

that criminal convictions not be overturned on the basis of irregularities in jury selection to which the defendant did not object or in which he has acquiesced. (Cal. Const., art. VI, § 13; People v. Edwards (1991) 54 Cal.3d 787, 813.) The failure to object will therefore continue to constitute a waiver of a claim of error on appeal.

Because we had not reaffirmed the Johnson rule (supra, 104 Cal. 418) at the time of defendant's trial, however, and the standard by which reversible error is to be determined presents an important question, we will address defendant's claim.

Notwithstanding the policy of random selection and equal opportunity for jury service by all qualified persons, not every departure from the statutory procedures constitutes reversible error. The Legislature also provided in former section 1059 that a challenge to the panel could be founded only on a material departure from those procedures. (See People v. Wright (1990) 52 Cal.3d 367, 394, 395.) Clearly, therefore, the Legislature did not intend that minor deviations from the statutory procedure be

grounds for reversal of a judgment of conviction. It follows that a defendant may not claim error on appeal if the procedure utilized in jury selection did not depart materially from the statutory procedures established to further the purpose of random selection.

The method by which prospective jurors were seated for the purpose of general voir dire in this case was not a material departure from the procedures established by statute. The nonstatutory procedure to which defendant now objects was used only to select (from the prospective jurors who remained on the venire after death qualification) the first twelve persons to be seated for general voir dire. Instead of directing the courtroom clerk to draw the names of 12 venirepersons at random,[12] the

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12. Code of Civil Procedure section 197, as it presently reads, implements the state policy of random selection: "(a) All persons selected for jury service shall be selected at random, from a source or sources inclusive of a representative cross-section of the population of the area served by the court," while Code of Civil Procedure section 198, directs: "(a) Random selection shall be utilized in creating master and qualified jurors lists . . . ."

Code of Civil Procedure section 194, subdivision (1), defines "random": "'Random' means that which occurs by

court sought a stipulation that defendant waive his right to random selection of the initial group of jurors. Instead, each attorney was to submit a list of 20 prospective jurors from which the court would select the first 12 to be seated, matching any who appeared on both lists.[13]

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mere chance indicating an unplanned sequence of selection where each juror's name has substantially equal probability of being selected."

At the time of this trial, former section 246 of the Code of Civil Procedure provided: ". . . The court shall select jurors from [the] panel for the voir dire process in a manner to insure random selection." Code of Civil Procedure section 222 now provides: "(a) Except as provided in subdivision (b), when an action is called for trial by jury, the clerk, or the judge where there is no clerk, shall randomly select the names of the jurors for voir dire, until the jury is selected or the panel is exhausted.

"(b) When the jury commissioner has provided the court with a listing of the trial jury panel in random order, the court shall seat prospective jurors for voir dire in the order provided by the panel list."

13. The court made the following proposal: "I was hoping that we could come up with a list of 20 prospective jurors that each of you would find acceptable and hopeful that we could arrive at a stipulation with the People and the defense, the defendant personally waiving his right to a secret-at-random selection of jurors, depending on the court's matching up specific jurors that fall onto both lists that the attorneys would provide me with.

"If you will do that, I'll assure counsel that I will not share the list of one attorney with the other, so it will eliminate

Counsel were assured that they would be permitted to excuse even persons they had nominated in this fashion, that neither would know if all or any of the initial 12 persons were on both lists, and that diligent voir dire would be permitted as in any other case.

Before the procedure was undertaken, defendant was advised by the court that he, like every other defendant, had a right to random, secret, impartial seating of all prospective jurors. The judge then said: "The inquiry the court will make is as follows: Does the defendant waive his right and agree that the court may chose the first 12 jurors to be seated, thereafter

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any fear of gamesmanship.

"Additionally, if we follow that process, it might cause us to be able to pick a jury much more quickly. It might be beneficial to both sides.

"It certainly would be beneficial to the court in saving time.

"Secondly, the court would, in no way, preclude either counsel in any way from inquiring of those that were selected by a non-random secret ballot.

"And further, as soon as the first 12 are seated, I would agree that there should be no additional wavering from the at-random secret process of selecting."

returning to the usual selection process?" At that point, defendant responded, "Yes."

Counsel for defendant stated that he had advised defendant that he and the prosecutor had each selected 20 jurors from whom the court would make the selection. He stated that defendant had agreed to waive the rights described by the court and to permit selection in that manner. The People also indicated agreement. The court then advised counsel that their lists had "minimally matched up" and that it was probable that there would be some among the first 12 jurors who had been on both lists. The court did not indicate what, if any, criteria were to be applied in the choice of prospective jurors to fill the remaining seats.

The court's explanation of the process to be used, the waiver elicited from defendant, and defense counsel's representation of his explanation to defendant reflect seemingly divergent views of the process to be utilized. The court did not promise that the first 12 jurors would all be selected from the

lists submitted by counsel. The waiver simply permitted the court to choose the first 12 jurors to be seated. When defendant's attorney said that he had told defendant that the jurors would be selected from the lists, the court said nothing to indicate a contrary intent. In fact, four were taken from the prosecution list, three from the defense list, and five were on neither list. Two of the prospective jurors had been included on both lists. Five of the jurors ultimately sworn to try the case had been chosen by the judge pursuant to this stipulation. Of those, two had not been on either list.

The superior court minutes reflect still another interpretation of the stipulation. The minutes recite: "Counsel stipulate the Court may select twelve prospective jurors at random from lists of twenty prospective jurors submitted by each side."

Notwithstanding defendant's present claim that he did not understand the procedure, he is not entitled to relief on appeal on grounds that the statutory jury selection procedures were not

followed. We are not faced here with a complete abandonment of random selection. When the general voir dire commenced, the venires of prospective jurors had already been examined in the sequestered Hovey voir dire. There is no suggestion that these venires had not been selected at random, pursuant to Code of Civil Procedure section 222. The prospective jurors in them had been seated for the initial voir dire in accordance with that random draw. The procedure here differs, therefore, from that at issue in People v. Wright, supra, 52 Cal.3d 367, 393-395, in which the initial seating for voir dire was not conducted in conformity with former section 222 of the Code of Civil Procedure.

In this case we are not concerned with the initial voir dire, or with a challenge to the panel. Only the general voir dire following the sequestered Hovey voir dire is in question. We agree with the assumption implicit in defendant's argument that, in the absence of a statutory provision adapting the procedures for selection of capital jurors to the mandate of Hovey (supra, 28

Cal.3d 1), trial courts should follow the procedures established by Code of Civil Procedure section 222 to select prospective jurors for a general voir dire which follows a sequestered Hovey voir dire. Because the stipulation applied only to the first 12 prospective jurors to be seated and the statutory procedure was followed in the initial selection of the prospective jurors and was followed thereafter, we do not deem the procedure to be a material departure from that mandated by the Legislature.

Defendant attempts to distinguish the procedure utilized in this case from that in People v. Wright, supra, 52 Cal.3d 367, on grounds that having presided over the sequestered voir dire the trial judge was aware of the biases of the jurors he selected. That distinction is insufficient to compel reversal since defendant acquiesced in this aspect of the selection process. Regardless of any possible misunderstanding as to the manner in which the trial court would select the first 12 jurors, it was apparent that the selection would be made from jurors whose views about capital punishment had been explored during the sequestered voir dire.

Defendant also argues that random selection is necessary to ensure the constitutional right to a jury drawn from a representative cross-section of the populace. To the extent that he claims the procedures utilized in selecting the jury before which he was tried denied him due process or rights under the Sixth Amendment of the federal Constitution and article I, section 16 of the California Constitution, the claim fails for similar reasons. Random selection does serve to ensure the jury trial rights granted by the Sixth Amendment and article I, section 16 of the California Constitution. Not every departure from the state statutory procedure, even if deemed material, necessarily denies a defendant the constitutional right to a jury selected from a representative cross-section of the populace, however. We reject defendant's claim that actual harm need not be shown. To warrant reversal of a judgment of conviction, the defendant must demonstrate that the departure affected his ability to select a jury drawn from a representative cross-section of the population.[14]

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14. The state policy enunciated in the statutes mandating random draw reflects concern "that all qualified

Defendant posits scenarios in which designation of acceptable jurors by the parties, or selection by the court, could result in exclusion by omission of categories of jurors in violation of People v. Wheeler (1978) 22 Cal.3d 258, or in a jury not drawn from a true cross-section of the population (see Duren v. Missouri (1979) 439 U.S. 357). He fails, however, to establish that the stipulation to seat the first 12 jurors for general voir dire, from prospective jurors already randomly selected for the sequestered voir dire, could or did have such an impact. To the contrary, the record confirms that during the general voir dire, 19 prospective jurors were randomly selected to replace those excused for cause or peremptorily challenged. Seven of the jurors seated to try the case were selected during this random

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persons have an equal opportunity . . . to be considered for jury service in the state and an obligation to serve as jurors when summoned for that purpose . . . ." (Code Civ. Proc., § 191.) The rights of prospective jurors are not before us in this appeal, however. We consider only whether the procedure ensured a fair trial at which the defendant's fundamental constitutional rights were protected. (See People v. Harris (1989) 47 Cal.3d 1047, 1071.)

draw. Five had been among the first twelve seated. This case differs markedly, therefore, from the jury selection process condemned in United States v. Kennedy (5th Cir. 1977) 548 F.2d 608, (hereafter Kennedy) on which defendant relies for his claim that relief is available without regard to a showing of actual harm.

Far from supporting this proposition, Kennedy concludes that the federal statutory right may be waived by failure to challenge the jury, and that more than simply a departure from random selection for the seating of some jurors is necessary to establish a violation of the constitutional right to a jury drawn from a representative cross-section of the community. (Kennedy, supra, 548 F.2d 608.) The issue in Kennedy was whether use of three volunteer jurors, who had just completed a term of jury service, to sit on a criminal jury constituted a substantial failure to comply with the random selection procedures of the Jury Selection and Service Act of 1968. (28 U.S.C. §§ 1861-1869.) The Fifth Circuit Court of Appeals held

that while there had been a substantial failure to comply with the act, the appellant was foreclosed from asserting the statutory violation by failure to challenge the jury on that ground, and that reversal on constitutional grounds was not warranted because the departure from statutory random selection procedures had not denied him the right to a jury drawn from a representative cross-section of the community.

The jurors in question had been randomly selected for the master jury list prepared for use at trials during the prior month. The court rejected that consideration as a basis for finding compliance with the statute, stating: "Nonrandom selection of a subgroup from a randomly selected group does not make for a randomly selected subgroup." (548 F.2d at p. 612.) Nonetheless, the defendant's "forfeiture of the statutory claim in no way affects the sanctity of a defendant's due process right to be tried by a jury drawn from a fair cross section of the community. While a properly preserved claim of substantial noncompliance with the Act would of course require reversal if

meritorious, the fundamental justice of a conviction remains intact if the jury selection procedure did not transgress that due process guarantee." (Id., at pp. 613-614.)

"The due process clause does not itself guarantee a defendant a randomly selected jury, but simply a jury drawn from a fair cross section of the community. A claim of denial of this due process right requires a showing that the jury selection process tended to exclude or underrepresent some discernible class of persons and consequently to defeat a fair possibility for obtaining a truly representative cross section." (Kennedy, supra, 548 F.2d at p. 614.) United States v. Northside Rlty. Assoc. (N.D. Ga. 1981) 510 F.Supp. 668 (hereafter Northsidg Rlty. Assoc.), offers no more support.

As defendant observes, insofar as it applies to petit juries the federal Jury Selection and Service Act of 1968 reflects a policy similar, if not identical, to the policy of this state, providing: "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to

grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose." (28 U.S.C. § 1861.)

In Northside Rlty. Assoc., supra, 510 F.Supp. 668, the dispositive issue involved substantial noncompliance with the act in a manner not unlike that in the case before this court. In selecting prospective jurors for assignment to divisions within the district from master jury wheels of qualified prospective jurors by use of a newly developed computerized selection procedure, the clerk failed to designate by random process the "starting number" by which the computerized sequence of selection from the wheel was to commence. Instead the jury clerk picked the starting numbers with the result that six of more

than five hundred numbers accounted for 32 percent of the choices.

The court dismissed indictments handed down by a grand jury in which the members had been selected in a process initiated in that manner, after finding that the deviation from the Act was substantial, and was not an infrequent or inadvertent departure. In so doing the district court accepted the reasoning of the Fifth Circuit in Kennedy, supra, 548 F.2d 608, that a showing of prejudice was not necessary to establish a substantial failure to comply with the Act. (510 F.Supp. at pp. 692-693.)

Unlike Kennedy (supra, 548 F.2d 608) and the instant case, however, the defendants in Northside Rlty. Assoc., supra, 510 F.Supp. 668, made a timely and procedurally proper challenge to the indictment, a challenge based on the departure from the statutory mandate of random selection. Thus, neither Kennedy nor Northside Rlty. Assoc. supports defendant's claim that even a substantial deviation from a policy mandating random selection justifies reversal of a judgment of conviction where no proper

pretrial challenge was made and no resultant denial of a jury drawn from a representative cross-section is demonstrated.

Defendant's protestations to the contrary notwithstanding, nothing in this record suggests that the statutory violation in this case so skewed the jury selection process that the procedure was so "inherently defective" as to be constitutionally invalid even without a showing that the jury actually chosen was not impartial. Nor is reversal required on grounds that the procedure threatened such a potential for abuse or appearance of partiality that reversal without a showing of actual prejudice is required to protect the integrity of the jury selection process.[15]

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15. We also reject defendant's argument that excusing jurors for hardship denied him a representative jury. (People v. Thompson (1990) 50 Cal.3d 134, 157-158.) He fails to demonstrate how a panel from which persons have been excused for hardship reasons is less representative. Code of Civil Procedure section 204, subdivision (b), now expressly permits such excusals, and they are to be granted only on a sufficient showing that the individual circumstances of the prospective juror make it unreasonably difficult for the person to serve or that hardship to the public will occur if the person must serve in the particular case.

Defendant makes no effort to identify any cognizable sector of the population that was underrepresented as a result of hardship excusals granted in this case, or to demonstrate that the

B. Impartial Jury -- Witherspoon-Witt Error.

Relying on language in Witherspoon v. Illinois, supra, 391 U.S. 510, 522, footenote 21, which this court once understood to state the constitutional rule (see People v. Velasquez (1980) 26 Cal.3d 425, 436), defendant claims that the trial court erroneously excluded prospective juror Dale Rokes, who expressed an abstract opposition to the death penalty, but did not make it "unmistakably clear . . . that [he] would automatically vote against the imposition of capital punishment without regard

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trial court abused its discretion in granting any particular hardship excuse (to most of which defendant stipulated). Moreover, as we have observed elsewhere, there is no authority for the proposition implicit in this argument that disparity which results notwithstanding the application of neutral and presumptively constitutionally permissible jury selection criteria, including discretionary hardship excuses, is a product of the "systematic exclusion" which the Constitution forbids. (See People v. Bell (1989) 49 Cal.3d 502, 530.)

We agree with defendant that some jurors were excused unnecessarily because they expressed reluctance to sit on the case. The judge offered to excuse jurors who, having thought about the case, "would rather not sit on this case for any reason." Some jurors expressed a preference not to remain. As defendant concedes, however, all of those prospective jurors were removed either by stipulation, by prosecutorial peremptory challenge, or, in one instance without objection by the defense.

to any evidence that might be developed at the trial of the case . . . ." (Witherspoon v. Illinois, supra, 391 U.S. 510, 522, fn. 21, italics omitted.)

Defendant recognizes that the United States Supreme Court has since clarified the governing principles, holding that a defendant's Sixth and Fourteenth Amendment right to an impartial jury is not compromised by the excusal of a prospective juror whose views about capital punishment give the "definite impression" that those views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (Wainwright v. Witt, supra, 469 U.S. 412, 424.) We have adopted the reformulated standard in applying the California Constitution. (People v. Cox (1991) 53 Cal.3d 618, 645; People v. Hamilton (1989) 48 Cal.3d 1142, 1165; People v. Ghent (1987) 43 Cal.3d 739, 767.)

We find no error. When asked at the outset of the voir dire if he had a conscientious objection to imposition of the death

penalty in an appropriate case, Rokes responded: "I don't know if I could, no." When pressed by the court to consider if "there's any possibility, by any stretch of the imagination, that you might impose a death penalty for a very horrible crime, for a mass murder," he again replied, "I don't think I could, no." Even as a juror deciding the fate of Adolf Hitler, Rokes believed, "No, I couldn't do it."[16/]

When asked by defense counsel if his position was that the state did not have the right to take life, Rokes responded: "No, I don't disagree with the law. I couldn't see myself as passing that type of judgment." And, when asked by the prosecutor if he could imagine any circumstance so offensive that he would vote for the death penalty, he replied: "No, I can't." Finally, the court explained its responsibility to determine if it was

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16. The question to be resolved under Witherspoon and its progeny is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror. The impact the juror's views might have in actual or hypothetical cases that are not before the juror are irrelevant to that determination. (People v. Fields (1983) 35 Cal.3d 329, 357.)

"unmistakably clear that under no circumstance [he] would ever vote for the death penalty" and asked: "That's the position you've taken?" Rokes replied: "Yes."

Defendant claims that the questions posed to the prospective juror focused on the wrong question, and did not establish Rokes's inability to follow the law. We see no possibility that Rokes was unaware that he was being asked if he could follow the law. Indeed, he stated that he did not disagree with the law. His answers made it unmistakably clear that he could not personally follow the law by voting to impose a sentence of death.

3. Jury "Indoctrination."

Defendant next complains that the prosecutor improperly used the Hovey voir dire (Hovey, supra, 28 Cal.3d 1) to indoctrinate prospective jurors and preargue his theory of the case. In the process, defendant claims, the prosecutor was permitted to inquire, by detailed hypothetical, but case-specific, descriptions, into whether the prospective jurors might find death

an appropriate penalty in the specific case. The conduct of the voir dire in this manner was, he argues, both error and misconduct because the prosecutor asked each juror to commit himself or herself in advance to a position.

Defendant offers as examples the voir dire of two prospective jurors who were later sworn to try the case. The first was asked: "If we get to the penalty phase, if we get that far, then you've already found the man guilty of first degree murder. It's a horrible crime. And you found he committed this murder while he was engaged in a robbery, based on facts that would be something like a man decides to commit a robbery, arms himself with a handgun to make sure he's successful, robs his victim. During the course of the robbery it occurs to him that if the victim is not alive, there won't be anybody going to the police and complain . . . . So, realizing that, the robber points his gun at the victim, pulls the trigger, shoots him once through the heart and kills him.

"That's the type of facts we're going to be dealing with, something along those lines, perhaps.

"Do you feel just, first of all, theoretically like it's possible you could vote for the death penalty if you're faced with facts such as those?"

Another juror was asked: "So now you're in a penalty phase with the defendant like this one, who has committed this kind of a crime and I want you to ask yourself, after looking inside yourself whether you could actually vote to put another human being to death for doing a crime like this:

"Let's assume you have a person who decides to commit a robbery because he wants to make some additional money. He goes out and gets himself a loaded handgun to make the odds more in his favor that he'll be successful. And he finds a victim that he thinks has some money and sure enough, the victim has some money when the defendant sticks him up. Sometime about this point the defendant has the brilliant thought that if I let this guy go, he's going to the police and I might get caught and

whereas if I don't let him go, don't leave any witnesses, I won't get caught, in other words I'd better kill him to make myself more certain of getting away.

"That's exactly what he does; he shoots the victim once through the heart and subsequently he's caught and he's been brought before us and you have found beyond any doubt that he's guilty of first degree murder committed during the course of a robbery.

"Do you think its possible that you could go in the jury room, look the other jurors in the eye and knowing you'll have to come out and look the defendant in the eye also, say I think this crime is so horrendous and the other background facts we've heard are so horrendous, he should be put to death?"

As we have observed before, "[t]he only question the court need resolve during this stage of the voir dire is whether any prospective juror has such conscientious or religious scruples about capital punishment, in the abstract, that his views would 'prevent or substantially impair the performance of his duties as

a juror in accordance with his instructions and his oath.'" (People v. Mattson (1990) 50 Cal.3d 826, 845.) The Hovey "voir dire seeks only to determine if, because of his views on capital punishment, any prospective juror would vote against the death penalty without regard to the evidence produced at trial." (Ibid.; People v. Clark (1990) 50 Cal.3d 583, 597. See also, Wainwright v. Witt, supra, 469 U.S. 412, 416.)

It was not necessary, therefore, to permit extensive questioning of the prospective jurors during the Hovey voir dire regarding their willingness to impose the death penalty based on the anticipated facts of, or a hypothetical set of facts based on, the case to be tried. Defendant objected neither to these questions, nor to similar questions asked of other jurors during the Hovey voir dire,[17] however.

17. We will not presume, even assuming arguendo that the voir dire exceeded proper limits of inquiry, that counsel should have done so. He may well have believed that this method of acquainting jurors with the evidence they were to hear would blunt its eventual impact. Having been forewarned, conditioned, or "indoctrinated," the jurors would not find the circumstances of the crime as shocking as they might otherwise.

Because a reviewing court is unable to ascertain the

Although voir dire is not a platform from which counsel may educate prospective jurors about the case, or compel them to commit themselves to a particular disposition of the matter, to prejudice them for or against a party, or to "indoctrinate" them (see People v. Williams (1981) 29 Cal.3d 392, 408), the scope of the inquiry permitted during voir dire is committed to the discretion of the court. Absent a timely objection to questions that arguably exceed the proper scope, any claim of abuse of discretion is deemed to have been waived.[18/]

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reasoning of trial counsel from the appellate record, a conclusion that a failure to object reflects incompetence is unwarranted. Unlike the dissent, we believe the rule of People v. Pope (1979) 23 Cal.3d 412, is sound and must be followed here. "Where the record does not illuminate the basis for the challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a petition for writ of habeas corpus." (23 Cal.3d at p. 426.)

Here, of course, defendant has not challenged the competence of trial counsel in his appeal. While he has properly reserved that claim, the dissenting justice raises it "ex proprio motu," i.e., of his own accord, and would reverse the judgment on an issue neither raised nor briefed.

18. Defendant suggests that an objection would have been futile because the judge participated in part of the voir dire to which he now objects. He also claims that the magnitude of the "error" is such that it is reversible per se, faulting the judge

D. Death Penalty Bias.

Prospective juror Austin responded to an inquiry by the court whether he had "a leaning one way or the other? Are you more included to be pro death as opposed to pro life" with: "Yeah, pro death." He stated that, "[I]t would have to be a lot" of mitigating evidence to convince him to return a verdict of life without possibility of parole. He denied that his views arose out of revenge, explaining simply that he was afraid that a person sentenced to life without parole might escape or be released, and

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for failing to carry out the court's independent duty to ensure the fair selection of an impartial jury.

Among the inquiries which defendant identifies as improper were questions asked by defense counsel in an effort to convince jurors reluctant to impose the death penalty that there might be circumstances in which they would vote for death. These inquiries were not improper. At the time of this trial both court and counsel could reasonably believe that excusal of a prospective juror for cause related to scrupled opposition to the death penalty was permissible only if he or she would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them." (Witherspoon v. Illinois, supra, 391 U.S. 510, 522, fn. 21; People v. Lanphear (1980) 26 Cal.3d 814, 840.) The questions reflect an attempt to retain reluctant jurors, a purpose to which defendant can have no legitimate objection.

did not think a person who premeditated before killing someone should be loose to kill again. He also preferred the death penalty to life imprisonment because he did not feel he could support such a person for the rest of his life.

Defendant educes from this that Austin was committed to voting for death in any case involving an intentional murder, or at a minimum had a bias for death. The trial court denied a challenge for cause, however, concluding that Austin's replies did not make it unmistakenly clear that he would impose the death penalty in all cases. We agree, but more importantly, as respondent notes, Austin was not selected as a juror or even seated during the general voir dire. Similarly, prospective juror Wheeler, who defendant claims was also biased toward death, was removed by the People's exercise of a peremptory challenge, and prospective juror Worrell was excused for hardship by stipulation.

E. Absence of Defendant.

Notwithstanding his execution of a written waiver of his right to be present at some stages of jury selection, and a subsequent oral waiver of that right, defendant claims that the judgment must be reversed because he was not present throughout jury selection. He argues that the right to be present during a crucial part of the trial may not be waived, and that even if waiver is permissible, his waivers were invalid.

Defendant concedes that the written waiver executed by him and his attorney on July 5, 1983, is in the language prescribed by subdivision (b) of section 977. That section expressly permits a defendant to waive his right to be present at all felony proceedings other than the arraignment, plea, preliminary hearing, taking of evidence, and imposition of sentence, i.e., proceedings at which the presence of the defendant "bears a reasonably substantial relation to the fullness of his opportunity to defend against the charge." (People v. Cooper (1991) 53 Cal.3d 771, 825; People v. Holloway (1990) 50 Cal.3d

1098, 1116.) It provides, however, that the defendant must, "with leave of court, execute in open court, a written waiver of his right to be personally present."

Defendant asserts that "apparently" his written waiver was not executed in open court. The minute order for that date recites, however: "A Waiver of Defendant's Personal Presence is received and ordered filed." Defendant offers no support for his assertion that the waiver was not executed in open court other than the omission of a recital to that effect in the minute order. The minutes recite that defendant and his counsel were present at the time the waiver was received. In the absence of any indication to the contrary we presume, as we must, that a judicial duty is regularly performed. (Evid. Code, § 664. See Ross v. Superior Court (1977) 19 Cal.3d 899, 913.)

Even absent such presumption, however, an irregularity in the procedure by which the waiver is executed is not grounds for reversal of the judgment in the absence of a showing both that the irregularity affected the voluntary and intelligent nature of

the waiver, and that the defendant suffered prejudice as a result of his absence from those aspects of jury selection from which he had absented himself. (People v. Medina (1990) 51 Cal.3d 870, 903; People v. Garrison (1989) 47 Cal.3d 746, 782-783.)

One week after his written waiver was accepted by the court, defendant's attorney advised the court that defendant did not want to be present during further voir dire proceedings. The court noted the prior written waiver and then agreed to acquiesce in defendant's request upon receiving an oral waiver and a statement that defendant volitionally and personally made the request. Defendant's waiver was then elicited and accepted by the court.

We have repeatedly rejected the argument that presence at all stages of a capital case is indispensible and thus unwaivable. (People v. Sully (1991) 53 Cal.3d 1195, 1238; People v. Cooper, supra, 53 Cal.3d 771, 825; People v. Medina, supra, 51 Cal.3d 870, 903; People v. Robertson (1989) 48 Cal.3d 18, 60-61; People v. Grant (1988) 45 Cal.3d 829, 845; People v. Odle

(1988) 45 Cal.3d 386, 406-407; People v. Hovey (1988) 44 Cal.3d 543, 585-586.) We are not persuaded that this conclusion should be reconsidered.

F. Exclusion of the Public and the Press.

Defendant next claims that reversal of the judgment is required because the public and the press were excluded from the sequestered "death-qualification" voir dire conducted pursuant to Hovey v. Superior Court, supra, 28 Cal.3d 1. He concedes that the issue was not raised in the trial court (People v. Thompson, supra, 50 Cal.3d 134, 156-157), but argues that the trial court did not give counsel "any real opportunity to do so" and suggests that defendant might not have been competent to waive the right.

As discussed above, the record does not afford any basis for questioning defendant's competence.

The record is also devoid of any support for defendant's claim that trial counsel had no opportunity to object to the sequestered voir dire. Nor will we infer such an inhibition,

particularly since the right to a sequestered voir dire was recognized in response to concerns of capital defendants over the potentially prejudicial effect of an open voir dire on jurors' views and willingness to reveal their views about capital punishment. (Hovey v. Superior Court, supra, 28 Cal.3d 1, 80.) As we observed in People v. Thompson, supra, 50 Cal.3d 134, 156-157, there was active litigation of the question of the right of the press to attend jury voir dire in 1983 when this trial occurred, and because the sequestered voir dire is for the benefit of the defendant "it is doubtful that any competent defense counsel would have objected to it."

We conclude, therefore, that no impropriety in the jury selection process warrants reversal of the judgment.

IV

GUILT PHASE ISSUES

A. Evidence and Argument Related to the Scofield Incident.

1. Cross-examination of Defendant.

As our brief description of the evidence offered by defendant reflects, his defense strategy involved an effort to attribute his actions to substance abuse, and to convince the jury that his use of cocaine shortly before the offenses so affected his mind that the murder was not intentional, wilfull, deliberate, or premeditated. In support of this effort he admitted his conviction for assault with a deadly weapon, but sought to minimize any implication that he was assaultive, and claimed that he was forced to plead guilty to that offense even though he had acted in self-defense.

In response, the People sought to bring out not only the details of defendant's 1978 assault on William Scofield, but other evidence about the incident, including evidence that

defendant had stabbed Kathy Cusack. Defendant was asked if he had kicked the door to the room open, and denied it. He denied that there was a woman in bed, that he had ever seen Cusack, that he had seen a pregnant woman on the night of the stabbing, that Scofield had been in bed, that he had stabbed Cusack, that he had been close enough to her to stab her, or that anyone had cried or screamed that she was pregnant.

Defendant now claims that the cross-examination during which the People elicited these answers was an improper inquiry into inadmissible evidence which implied that he had stabbed Cusack. The prosecutor's questions, defendant claims, were testimony. He did not object on those grounds, however, or on grounds that the cross-examination exceeded the scope of direct. He made only a relevance objection to a question asking if he had decided to plead guilty and go to state prison, and objected, on grounds that the questions assumed facts not in evidence, to a question asking if he recalled that the initial argument had been over the loss of Cusack's cat. Therefore, even were we to

assume that questions were improper, the failure to object bars reversal on that ground. (Evid. Code, § 353, subd. (a).)

We make no such assumption, however, since the inquiry into all of the circumstances of the attack on Scofield was well within the scope of defendant's testimony on direct examination, and sought to elicit evidence relevant to whether defendant had purposefully engaged in violent assaults in the past. Defendant having introduced evidence that his conviction of assault with a deadly weapon was based on conduct he took in self-defense, the People were not precluded by Evidence Code sections 761 and 787 from attempting to rebut that evidence by bringing out all of the circumstances of the incident in which Scofield was attacked. Defendant had placed his character in issue, attempting to show that he did not commit a premeditated murder, and in aid of that effort to cast a favorable light on the circumstances of his prior conviction. The People were, therefore, entitled to cross-examine him regarding all of the circumstances for purposes of impeachment. (Evid. Code, §§ 773, 780; People v. Lang (1989)

49 Cal.3d 991, 1017; People v. Wagner (1975) 13 Cal.3d 612, 617; People v. Schader (1969) 71 Cal.2d 761, 770-771.)

Defendant's effort to convert the issue into one of prosecutorial misconduct fares no better. Defendant seeks to rely on the well-established rule that a prosecutor may not examine a witness solely to imply or insinuate the truth of the facts about which questions are posed. (See People v. Wagner, supra, 13 Cal.3d 612, 619; People v. Hamilton (1963) 60 Cal.2d 105, 116, disapproved on another point in People v. Morse (1964) 60 Cal.2d 631, 649.) That reliance is misplaced. Here the inquiry about the assault on Cusack was unquestionably predicated on evidence available to the prosecution. This is not a case in which the evidence would have been inadmissible but for the fact that defendant's answers may have been untruthful. (See People v. Lavergne (1971) 4 Cal.3d 735, 744.) The evidence would have been admissible. A prosecutor is not under compulsion to anticipate that a witness's memory of additional details regarding events about which he has testified will

suddenly fail on cross-examination. The questions were leading, but such questions are not improper when asked in good faith of a presumptively hostile witness on cross-examination. (Evid. Code, § 767, subd. (a)(2); People v. Williams (1957) 153 Cal.App.2d 5, 8; People v. Kostal (1954) 123 Cal.App.2d 120, 123.)

2. Admission of Photographs.

Defendant objected, on relevancy grounds and on grounds that they were so gruesome that the prejudicial impact outweighed their probative value (Evid. Code, §§ 350, 352), to introduction of photos of the stab wounds suffered by Cusack.

The photos introduced by the People included one of the door to the room from which Scofield had been dragged and behind which Cusack had been stabbed. Defendant had denied that he and his companions had kicked in the door to the room, had denied that a woman had been in bed in the room, and had denied that he had ever seen Cusack. The photos were relevant, therefore, to impeach his testimony. They were tied to the

assault by the testimony of Officer McKay, who had arrived at the crime scene shortly after the stabbings occurred and had photographed the scene. From there he had gone to the hospitals to which Scofield and Cusack had been taken for treatment, where he photographed their wounds. He described the wounds, without objection, in his testimony.[19]

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19. Defendant contends that the court should have excluded McKay's testimony as irrelevant on its own motion. For the reasons stated we do not agree with the assumption that this testimony was irrelevant. Nor is the issue preserved for appeal.

While a court may exercise such authority under Evidence Code section 352 (People v. Hall (1986) 41 Cal.3d 826, 834-835; People v. Jackson (1971) 18 Cal.App.3d 504, 509), the failure to so act cannot be urged on appeal as error. Neither this court, nor defendant, can avoid the command of Evidence Code section 353, that "A verdict . . . shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

The record confirms that the trial court properly weighed the probative value of the photos against their prejudicial impact before admitting them. There was no abuse of discretion. (People v. Harris, supra, 47 Cal.3d 1047, 1095.)

3. Guilt Phase Argument.

In a related argument, defendant contends that the prosecutor improperly implied, during closing argument at the guilt phase, that defendant had stabbed Cusack.[20/] The argument was closely tied to the impeaching evidence, however, and

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"(a) There appears of record an objection to or a motion to exclude or to strike the evidence . . . ."

20. This argument was directed to the prosecutor's emphasis on the evidence that impeached defendant's testimony that although he had been convicted on a plea of guilty of the stabbing of Scofield, he had been acting in self-defense. The prosecutor referred to defendant's denials that the door had been kicked in, that more than one person had been in the room, and that a second person had been stabbed. He then reminded the jury of the photographs of the crime scene depicting the door and the blood on both the bed and the floor. Finally he stated: "I asked the defendant, are you sure there wasn't a girl there that night? Are you sure about that? Are you sure you didn't stab somebody else?" and "Kathy Cusack, the woman who didn't exist in the defendant's story, was stabbed seven times."

defendant did not object. To the extent that it might have lacked a basis in the evidence,[21/] any harm could have been cured by such objection and an admonition by the court. Absent objection, the issue has not been preserved for appeal. (People v. Lewis, supra, 50 Cal.3d 262, 283; People v. Green (1980) 27 Cal.3d 1, 28.)

B. Miranda Warnings Prior to Videotaped Reenactment.

The trial court found, and defendant does not challenge the finding, that prior to making the taped statement to police in which he admitted shooting Dykstra, defendant had "waived his rights under the Miranda decision, that the waiver is freely, voluntarily, knowingly, and intelligently given." Defendant now claims, however, that the officers were obligated, but failed, to

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21. We recently affirmed that "the prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper. Opposing counsel may not complain on appeal if the reasoning is faulty or the deductions are illogical because these are matters for the jury to determine. [Citation.] The prosecutor may not, however, argue facts or inferences not based on the evidence presented." (People v. Lewis (1990) 50 Cal.3d 262, 283.)

properly repeat the Miranda advisement (see Miranda v. Arizona (1966) 384 U.S. 436) prior to the videotaping session conducted six hours later.

We reject this claim. First, defendant did not object to admission of the videotaped reenactment on this ground at trial and thus did not preserve the issue for appeal. (People v. Mattson, supra, 50 Cal.3d 826, 853-854; People v. Milner (1988) 45 Cal.3d 227, 236.) Moreover, he agreed to participate in the reenactment during the initial interrogation at which he had voluntarily waived his rights.[22/] Defendant cites no authority

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22. At the conclusion of the interview during which defendant confessed, the interrogating officer asked defendant: "Would there be any problem with you in doing re-enactment of what happened last night . . . . We'll do it in video and take the cameras out, our cameras, for--for investigative purposes, out taking pictures of you and explaining what happened as things went along." Defendant asked, "Yeah, at the scene of the crime?" and then stated: "Sure. I guess I wouldn't mind doing it." Asked twice after that if this would "be a problem" for him, defendant twice replied, "No," adding, "I'll do it" the second time.

At the Santiago Canyon site, defendant was given a general warning by Officer Sidebotham: "John, do you realize that anything you say is being video tape recorded?" to which defendant replied, "Yes, sir."

Sidebotham then reminded defendant: "And that

for the that proposition that, notwithstanding the initial waivers and agreement to the procedure, further warnings and waivers were necessary at the time of the actual videotaping.

Assuming that agreement to continue the interrogation process later was not a sufficient waiver, however, in circumstances such as those here, where the subsequent interrogation took place only a few hours thereafter, the truncated advice given was sufficient. When a subsequent interrogation is reasonably contemporaneous it is not necessary to repeat the full Miranda warning. (People v. Braeseke (1979) 25 Cal.3d 691, 701-702, vacated and cause remanded (1980) 446 U.S. 392, reiterated 28 Cal.3d 86, and cases cited.) Defendant was told that his statements could be used against him, and was reminded of the rights he had waived earlier in the day. In asking defendant if he still wanted to waive his rights, Officer Sidebotham clearly implied that those rights were still available

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Investigator Coder and Investigator Heacock previously advised you of your constitutional rights and that you waived those rights . . . . Do you still want to waive these rights?" Defendant replied again, "Yes, sir."

to defendant. (See People v. Mattson, supra, 50 Cal.3d 826, 858; People v. Duren (1973) 9 Cal.3d 218, 242.)

C. Instructional Error.

1. Consideration of Juvenile and Misdemeanor Offenses.

Defendant next argues that the court erred in failing to instruct the jury sua sponte that it could not consider offenses he committed as a juvenile (sale of narcotics, truancy, trespassing, escape) and his misdemeanor conviction of vandalism in determining his guilt. He concedes that evidence of these offenses was either admitted without objection or was introduced by defendant himself, but claims that the court was obligated nonetheless to instruct on the limited purpose for which the evidence could be considered.

The rule is otherwise. "Although the trial court may in an appropriate case instruct sua sponte on the limited admissibility of evidence of past criminal conduct, we have consistently held that it is under no duty to do so." (People v. Collie (1981) 30 Cal.3d 43, 63.) We are not persuaded that an exception is

warranted in this case. Indeed, defendant's reason for offering evidence of his past misconduct was to persuade the jury that his present offense, like the earlier ones, was the product of his abuse of drugs. He invited the jury to consider those offenses in determining his guilt, and may not complain on appeal that it did so. (See People v. Williams (1988) 44 Cal.3d 883, 958-959.)

2. Evidence of Mental State.

Defendant claims that the instructions given by the court were not adequate to advise the jury of the relevance of the evidence of drug-induced psychosis, sleep deprivation, and "near automated response to his accomplice's command" to finding the existence or absence of the mental elements of the offenses with which he was charged -- murder, attempted murder, and robbery. He complains in particular that the court refused to give instructions on "diminished actuality."

No such instructions were requested, however. Rather, defendant requested instructions on "diminished capacity." (CALJIC Nos. 4.25, 8.41, 8.48.) The court refused those

instructions, which address a defendant's general capacity or ability to form a specific intent or harbor a mental element of an offense, because the defense had been abolished by the amendment of section 22 in 1982, and by the addition of section

25,[23] an initiative measure adopted by the electorate in the June 8, 1982, election.

It is clear from the jury verdicts that the jury determined that the murder as a felony murder committed during the

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23. Section 25, subdivision (a) provides: "The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged."

As amended by statutes 1981, chapter 404, section 2, pages 1591-1592, and statutes 1982, chapter 893, section 2, pages 3317-3318, section 22 provides: "(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation or malice aforethought, with which the accused committed the act.

"(b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.

"(c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance."

perpetration of robbery. Therefore, the only mental state now relevant to those two offenses is the intent to steal.[24] Both malice and intent to kill are elements of attempted murder, however. The issue is whether the instructions given were adequate to inform the jury that defendant's evidence of drug-induced intoxication and the expert testimony regarding his mental state could be considered in determining if defendant did harbor these mental elements at the time of the offenses. It is clear that they were adequate.

The trial court instructed the jury: "In the crimes charged in counts I, II, and III of the Information, namely murder, attempted murder and robbery, a necessary element is the existence in the mind of the defendant of a certain specific intent or mental state. These are included in the definition of the crimes charged.

"If the evidence shows that the defendant was intoxicated at the time of the alleged offense, the jury should consider his

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24. The jury made a special finding that the murder was intentional.

state of intoxication in determining if the defendant has such specific intent or mental state.

"If from all of the evidence you have a reasonable doubt whether defendant was capable of forming such specific intent, or mental state, you must give the defendant the benefit of that doubt and find that he did not have such specific intent.

The court also instructed the jury on the elements of manslaughter,[25] after which a further instruction on intoxication was given:

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25. Defendant claims the court refused to instruct on voluntary manslaughter. The record confirms that two instructions on manslaughter were given. In the first, the court did not define voluntary manslaughter.

"The crime of manslaughter is the unlawful killing of a human being without malice aforethought.

"Involuntary manslaughter is the unlawful killing of a human being without malice aforethought and without an intent to kill."

The court also instructed:

"The distinction between murder and manslaughter is that murder requires malice while manslaughter does not . . . . If you are satisfied beyond a reasonable doubt that the killing was unlawful, but you have reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of such doubt, and find it to be manslaughter rather than murder."

The jury found under properly given instructions that the murder was intentional, and was committed in the perpetration of robbery, thus establishing that the killing was murder of the first degree under the felony-murder rule and section 189 without the necessity of proving malice. Any error in failing to instruct on voluntary manslaughter was harmless. (People v. Sedeno (1974) 10 Cal.3d 703, 721. See also People v. Saille (1991) 54 Cal.3d 1103, 1114 [Malice shown whenever killing is intentional unless negated by evidence of sudden quarrel or heat of passion].)

"If you find that the defendant killed while unconscious as a result of voluntary intoxication and was therefore unable to form a specific intent to kill or to harbor malice aforethought, his killing is involuntary manslaughter."[26]

With respect to felony-murder-robbery, the court instructed the jury: "Before the defendant may be found guilty of the unlawful killing of a human being as a result of the commission or attempt to commit the crime of robbery, you must take all the evidence into consideration and determine therefrom, if at the time of the commission or attempt to commit such crime, the defendant was suffering from some abnormal mental or physical condition, however caused, which prevented him from forming the specific intent to commit such crime."

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26. Defendant claims that these instructions, "diminished capacity" instructions, were given erroneously. The instructions could only have been beneficial to him, however, since they permitted the jury to speculate whether the evidence indicated that he lacked the capacity to harbor the relevant mental states, while the other instructions limited the jury to determining whether, in fact, the mental elements of the offenses were present.

The jury was, therefore, instructed repeatedly that it should take into consideration the evidence of abnormal mental state in determining whether the mental states that are elements of these offenses were present, and was advised that drug-induced intoxication was evidence that should be considered in making that determination. There was no error in this regard.[27]

3. Murtishaw Error.

Defendant correctly observes, and the People concede, that the trial court erred in failing to limit the instructions on implied malice to the murder count. As we explained in People v. Murtishaw (1981) 29 Cal.3d 733, 764-765: "[O]nce a defendant intends to kill, any malice he may harbor is necessarily express

27. In an attempt to establish prejudicial error in the instruction, defendant claims that these instructions, coupled with the omission of a voluntary manslaughter instruction, prevented the jury from considering whether he intended to kill, but did not do so unlawfully because of some provocation spurred by drug use or impulse. Defendant acknowledges that the robbery verdict undercuts this argument, but claims that inadequate instructions make the jury finding of intent to rob "suspect." We are not persuaded. Defendant's own statements established beyond any question that existence of an intent to rob.

malice. Implied malice . . . cannot coexist with a specific intent to kill. To instruct on implied malice in that setting, therefore, may confuse the jury by suggesting that they can convict without finding a specific intent to kill."[28] While assault with intent to commit murder (former § 217) was in issue in Murtishaw, that rule applies equally to attempted murder since intent to kill is also an element of attempted murder. (People v. Ratliff (1986) 41 Cal.3d 675, 695; People v. Ramos (1982) 30 Cal.3d 553, 583 revd. on other grounds sub nom. California v. Ramos (1983) 463 U.S. 992.)

The court also failed to instruct that an intent to kill is an element of attempted murder, telling the jury only that there must be "a specific intent to commit the crime, and the direct but ineffectual act done toward its commission." As a result, defendant argues, the jury might have believed that an attempted murder verdict, like a verdict on second degree murder on which

28. The court gave only a general instruction on the elements of attempt. This was followed by instructions on the elements of murder and defining express and implied malice.

it had been instructed, could be returned if implied malice were found.

The People, relying on People v. Dyer (1988) 45 Cal.3d 26, 65, and People v. Lee (1987) 43 Cal.3d 666, 677, contend that the error was harmless. Dyer is not helpful to their position, however, since in that case the jury convicted the defendant of attempted first degree murder and had been instructed that a specific intent to kill was an element of that offense. The Lee jury had also been instructed that the prosecution had to prove that the defendant shot with the specific intent to kill, and the arguments of counsel were directed to the existence of that intent.

We conclude nonetheless that the omission could not have prejudiced defendant. The jury was instructed that the defendant must have a specific intent to commit the crime, i.e., murder, and murder had been defined. In his argument the prosecutor had stated that the implied malice/felony-murder instructions were inapplicable to attempted murder, and that in attempted murder

there must be express malice and intent to kill.[29] The prosecutor's argument emphasized the evidence that defendant shot Wolbert three times, and that because the third shot was fired into Wolbert's face at point-blank range "there's no question what was in the mind at that point. There's no question what his intent was . . . . There's no question what this man's intent was when he did that. He intended to kill a second victim. . . ."

The argument of defense counsel was directed primarily to the murder count, but in his attempt to persuade the jury that defendant did not intend to kill, he made reference to the shooting of Wolbert as well as that of Dykstra. There is no

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29. Anticipating the instructions to be given, the prosecutor stated:

"The second crime charged is attempted murder. It's a very simple concept. It applies just to be top part of that diagram [outling the elements and theories of first degree murder].

"Basically it says you attempt, attempt to unlawfully kill another human being with express malice aforethought, in other words, you attempt to kill and you do something with the intent to kill, you try to kill, but for one reason or another you're unsuccessful, that's attempted murder."

question, therefore, but that the jury was aware that a specific intent to kill was an element of attempted murder. (Cf. People v. Howard (1992) 1 Cal.4th. ___ (SO04562 [typed maj. opn. at pp. 48-49].) The instructional error was harmless beyond a reasonable doubt.

4. Consideration of Lesser Included Offenses (Stone/Kurtzman).

The court instructed that the jury must unanimously agree and sign a verdict finding that the defendant was not guilty of first degree murder before the jury could find defendant guilty or not of second degree murder. Defendant claims that the court erred in giving an instruction that required an acquittal of first degree murder before consideration of lesser included offenses.

The instructions were proper. They did not preclude consideration of lesser offenses. "Stone [Stone v. Superior Court (1982) 31 Cal.3d 503] should be read to authorize an instruction that the jury may not return a verdict on the lesser offense unless it has agreed beyond a reasonable doubt that

defendant is not guilty of the greater crime charged, but it should not be interpreted to prohibit a jury from considering or discussing the lesser offenses before returning a verdict on the greater offense." (People v. Kurtzman (1988) 46 Cal.3d 322, 329, original emphasis.) We concluded in Kurtzman that this rule was adequate to protect the defendant's interest that jury deliberations not be improperly restricted.

5. Other Instructional Error.

Defendant also complains that the court erroneously gave instructions on flight and concealment of evidence, that it was error to instruct that the degree of murder is not an element of the crime, and that the order of the instructions was confusing.[30]

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30. Defendant also claims that his waiver of the right to be present throughout the voir dire of prospective jurors was ineffectual, that reversal should also be granted because he was absent during discussions in chambers between the judge and counsel regarding instructions and moving admission of exhibits. Our conclusion above that neither section 977 nor constitutional authority supports defendant's claim that the voluntary absence of a defendant during some proceedings, even in a capital case is impermissible, disposes of this claim as well.

The flight instruction, given in the language of CALJIC No. 2.72, advised the jury that evidence of flight alone is insufficient to establish guilt, but may be considered with other proven facts in deciding the question of guilt or innocence. It followed the language of section 1127c. "An instruction on flight is properly given if the jury could reasonably infer that the defendant's flight reflected consciousness of guilt, and flight requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested." (People v. Crandell (1988) 46 Cal.3d 833, 869.)

The jury could infer from the actions of defendant immediately following the crime that his flight with Hefner reflected consciousness of guilt. This conclusion is not affected by defendant's decision to contest only the mental state with which he acted. Even were we to conclude that the instruction should not have been given, however, it was clearly harmless. As in Crandell, supra, 46 Cal.3d 833, the instruction did not

assume that flight was established, leaving that factual determination and its significance to the jury.

Nor are we persuaded that the instruction on concealment of evidence (CALJIC No. 2.06) was improper simply because it was Hefner who had concealed the gun. The evidence permitted an inference that Hefner had acted on behalf of defendant as well as in concealing the weapon and that he did so with defendant's encouragement. Again, however, if there was error it was harmless beyond a reasonable doubt.

The offense with which defendant was charged was "murder." The court correctly instructed that the degree is not an element of that crime. The degree is not an element of either first or second degree murder. The court correctly instructed the jury that "all murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree," and that "the unlawful killing of a human being whether intentional, unintentional, or accidental, which occurs as a result of the

commission of or attempt to commit the crime or robbery, and where there was in the mind of the perpetrator the specific intent to commit such crime, is murder of the first degree."

The jury was thereby required to find all of the elements of the offense of first degree murder. The jury was also instructed that "the burden is on the state to prove beyond a reasonable doubt each of the elements of murder." Contrary to defendant's claim, the instructions did not shift the burden to the defendant, nor would they confuse the jury as to the elements that had to be proven beyond a reasonable doubt.[31/] Although the general rule is that the order in which instructions are given is immaterial and is left to the sound discretion of the trial court (People v. Sanders (1990) 51 Cal.3d 471, 519; People v. Carrasco (1981) 118 Cal.App.3d 936, 942), we have reviewed the order in which the instructions were given in this case and are satisfied that the

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31. Defendant apparently concedes that jury unanimity on the theory of first degree murder is not required. (See Schad v. Arizona (1991) 501 U.S.___ , ___ ; [111 S.Ct. 2491, 2503-2504 (plur. opn.), 2506-2507, conc. opn. of Salia, J.)]; People v. Milan (1973) 9 Cal.3d 185, 194-195; People v. Nicholas (1980) 112 Cal.App.3d 249, 273.)

order was logical and that no confusion was reasonably possible. (People v. Ford (1964) 60 Cal.2d 772, 793.)

V

SPECIAL CIRCUMSTANCES ISSUE

Defendant argues that the failure of the trial court to instruct the jury pursuant to People v. Garcia (1984) 36 Cal.3d 359, and Carlos v. Superior Court (1983) 35 Cal.3d 131, that a specific intent to kill is a necessary element of a felony murder special circumstance was error that requires that the felony-murder robbery special-circumstance be set aside. It is not sufficient, he claims, that the jury found, under other proper instructions, that the murder was intentional because the jury must also find that the murder was committed with express malice, premeditation, and deliberation.

This claim lacks merit. Carlos v. Superior Court, supra, 35 Cal.3d 131, was reconsidered and overruled in People v. Anderson (1987) 43 Cal.3d 1104, in which we held that intent to kill is not necessary if a defendant convicted of first degree

murder personally killed the victim. Consequently, Carlos applies only to murder committed between December 12, 1983, the date on which Carlos was decided, and October 13, 1987, the date on which it was overruled. (People v. Whitt (1990) 51 Cal.3d 620, 637; People v. Thompson, supra, 50 Cal.3d 134, 175; In re Baert (1988) 205 Cal.App.3d 514, 517-522.) The jury found on other properly given instructions that defendant personally killed Dykstra. It is also well established that the felony-murder special circumstances (§ 190.2, subd. (a)(17)) are not limited to premeditated and deliberate murders, and that such a requirement is not mandated by the Eighth Amendment or other constitutional considerations. (People v. Belmontes (1988) 45 Cal.3d 744, 794-795.)

VI

PENALTY PHASE ISSUES

A. Instructions.

1. CALJIC Former No. 8.84.2.

The court instructed the jury in the language of CALJIC former No. 8.84.2: "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.

"However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without possibility of parole."

Relying on People v. Brown (1985) 40 Cal.3d 512, 538-545 (revd. on other grounds sub nom. California v. Brown (1987) 479 U.S. 538), defendant contends that this instruction and the prosecutor's penalty phase argument, without further explanation of the weighing process and the role of the jury in determining

the appropriate penalty, misled the jury.[32/] Together these factors restricted the jury to implementing a mechanical weighing formula under which imposition of the death penalty was mandatory if "bad" outweighed "good," and left the jury without an understanding of its role and responsibility in determining the appropriate penalty.

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32. In support of his claim that the jury was misled, defendant also points to statements and questions by both the judge and the prosecutor during the voir dire which may have led prospective jurors to believe that assessment of the penalty was a mechanical process which they would be obligated to carry out. The prosecutor's explanation to the jurors in the penalty phase argument, coming week is after the voir dire, and immediately before the matter was submitted to the jury, was unquestionably adequate to dispel any misunderstanding of their role these statements and questions may have invited.

The voir dire statements by the judge anticipated the "unadorned" instruction given later. Explaining the penalty phase procedure, the judge told the prospective jurors, inter alia, that if the "evidence of mitigating factors, that is, factors that are beneficial to the defense side, outweigh the aggravating factors, your duty is to come back with a verdict of the mitigated sentence, that is, life without possibility of parole.

"If the aggravating factors, in your judgment, outweigh the mitigating factors, the aggravating factors being that evidence that is bad, or goes to the detriment of the defendant, or damning in nature as far as the defendant is concerned, if that outweighs the mitigating factors, your responsibility is to come back with a verdict of death."

In a related argument, defendant argues that reversal of the judgment of death is required because the record does not affirmatively demonstrate that the jury properly considered all mitigating evidence and inferences. In support of this claim, defendant relies not only on the use of CALJIC former No. 8.84.2, but also on a perceived failure of other instructions to ensure that the jury was aware of the full extent of its discretion to consider any mitigating evidence.

When addressing such claims we examine the entire record, including the instructions and arguments, to determine whether the jury was misled to the prejudice of the defendant about the scope of its sentencing discretion. (People v. Brown, supra, 40 Cal.3d 512, 544, fn. 17.) We must ascertain whether, overall, the jury was adequately informed of the full nature of its sentencing responsibility, both as to the manner in which the various factors are to be weighed and as to the scope of its sentencing discretion. (People v. Belmontes (1988) 45 Cal.3d 744, 802-803.)

Having reviewed the record here, we are satisfied that the argument of counsel clearly informed the jury that the weighing process was not mechanical, and impressed on the jurors that they had both the discretion and the responsibility to determine whether death was the appropriate penalty in light of all of the evidence. Indeed, the prosecutor opened his argument by advising the jury that at this stage of the trial the only question to be answered was "in light of what you know this defendant has done, what penalty or punishment does he deserve?"

The prosecutor made it clear that the weighing process was not arithmetical or mechanical. He told the jurors that after they had decided that a factor was applicable and decided if it was aggravating or mitigating, "finally you attach a weight to it. In other words, you ask yourselves how important is the factor . . . how important is it in the overall picture? . . . [O]nce you've done that and you've attached a weight to each one of the factors, you look at the total weight at the end of your deliberations on each one of the factors and you answer the final

question: Do the aggravating factors outweigh the mitigating? In which case you vote for the death penalty. On the other hand, if you think that the mitigating factors outweigh the aggravating factors, you give the defendant the lesser sentence of life in prison without possibility of parole."

He impressed on the jurors the tremendous responsibility they undertook "sitting in life or death judgment of a human being," and told them that "the way you really answer these questions . . . the way you will make your ultimate determination is by determining what kind of a crime this is and by determining what kind of a person it was who committed the crime." As he was reviewing the evidence and its relationship to the statutory aggravating and mitigating factors, the prosecutor told the jury that factor (k) -- "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" -- (§ 190.3, factor (k)), allowed the jury to "consider pity and sympathy for him and theoretically that's enough to save his

life . . . . If you feel sorry for him, you can give him the benefit of that pity and sympathy and you can save his life."[33]

The jury was told that one factor alone could save defendant's life even though all of the others were "overwhelmingly aggravated," if by itself it weighed more than the other factors.

We see no likelihood, based on the prosecutor's argument, that the jury would have believed that the weighing process involved nothing more than adding the number of mitigating and aggravating factors. In summation, he told the jurors that it was their duty and obligation to return a verdict of death "if that's what he deserves." The jury was thus impressed with the scope of its discretion and its responsibility to determine the appropriate penalty.[34]

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33. Pursuant to agreement by counsel, the court's instruction on this factor supplemented the statutory language with: "or any factor offered by the defense as a factor in mitigation of the penalty," thus making it clear that the jury could consider any mitigating evidence.

34. In support of his claim that the jury was misled, defendant argues that the prosecutor also argued that the

absence of some statutory mitigating factors should be considered aggravating. After the trial of this case we held in People v. Davenport (1985) 41 Cal.3d 247, 289-290, that such argument was improper and should not be permitted in the future because it was likely to confuse the jury as to the meaning of the terms "aggravation" and "mitigation." It is not improper, however, to review each factor and the possible relevance of the evidence to finding it present.

The prosecutor's argument in this case followed a permissible pattern of review. He used the absence of a factor as a springboard from which to launch his discussion of the evidence which precluded finding the factor to be present. In the instances relied on by defendant to establish "Davenport error," the context made it clear that he was relying on the aggravating nature of the evidence, not the absence of a mitigating factor, in his attempt to persuade the jury that death was the appropriate penalty.

Thus, in commenting on factor (e) -- "[w]hether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act" -- (§ 190.3, factor (e)), the prosecutor emphasized that the victims were lured to the scene. "The defendant lied . . . they didn't have anything to do with what happened that day. That's an aggravating factor. If it applies again -- maybe you don't think that applies, but if anything it's an aggravating factor."

The prosecutor left categorization of age (§ 190.3, factor (i)) to the jury, stating only it was not mitigating and that the jury "may think it isn't a big deal, or it's an aggravating factor." As to section 190, factor (j) -- "[w]hether or not the defendant was an accomplice to the offense and his participation in the offense was relatively minor." -- the prosecutor said that because defendant was the "triggerman" the factor could not help him. "That's an aggravating factor." Again, the reference was to the evidence that defendant personally shot the victims, not to the absence of section 190, factor (j), as the aggravating

Defendant's attorney also emphasized that while the prosecution might be asking that a verdict of death be returned even though the defendant was "49 percent good," an inaccurate but possibly effective tactic, "it's not that easy a case in my opinion. That's not the type of procedure that can be taken lightly without careful evaluation and careful consideration." He also urged the jury to consider sympathy and pity "because there's nothing more serious than what you're being asked to do. You're being asked to take somebody's life. That's the bottom line."

Again it was made clear that no mechanical weighing was expected, and that the jury's responsibility was to determine, based on all of the evidence, and considering sympathy and pity for the defendant, if he should be put to death. The court included an instruction that the jury could "consider pity and sympathy for the defendant in deciding the penalty to be imposed on the defendant."

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consideration.

We reject petitioner's argument that the jury may not have known that it could consider all mitigating evidence that was before it. Here, as in past cases, defendant argues that the jury may have believed it was limited because the statutory factors referred only to "extreme" mental or emotional disturbance and "extreme" duress. Again we are satisfied that this language did not impermissibly restrict the jury's exercise of discretion. (See People v. Morris (1991) 53 Cal.3d 152, 225-226, and cases cited.) There was no suggestion in the argument of counsel, for instance, that the jury could not consider whether defendant acted under duress because the instruction referred only to "extreme" duress. The prosecutor argued that the jury should reject defendant's attempt to persuade them that Hefner had "convinced him he should," but never suggested that the rejection should be because the evidence did not demonstrate "extreme" duress. Indeed, the arguments of both counsel assumed, and made clear to the jury that counsel assumed, that the jury would consider all of the mitigating evidence and

inferences that might be drawn therefrom. Recognizing that the jury might not find the mitigating evidence persuasive, however, counsel made no effort to rely on it. We are satisfied, nonetheless, that the jury was not misled, and was aware that it was free to consider any evidence presented at the guilt and penalty phases of the trial in mitigation.[35/]

2. Instructions on Lesser Offenses.

Defendant argues that because the court did not give clear instructions on all possible lesser included offenses, the reliability of the verdict of death has been undermined. We have rejected his claim that there was prejudicial guilt phase error in

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35. Defendant's counsel told the jury that in addition to the statutory factors "we have in addition . . . any other factor that you think is relevant in considering whether or not this case should be mitigated. We also have one that is not listed there. You may consider pity or sympathy for the particular defendant, so we have a lot of different factors to consider."

Counsel did not argue that any statutory mitigating factor was present. He adopted a different tactic, conceding that the jury could find that all of the possibly aggravating factors were present, and none of the mitigating. His approach was to note the tragedy and the impact of the murder victim's death on other people, and to ask the jury not to add to the tragedy or cause others to suffer the same impact by condemning defendant to death.

the court's failure to instruct on voluntary manslaughter. In this context, however, he argues that the omission of the instruction may have prevented the jury from understanding the distinction between the degrees of murder and manslaughter and between voluntary and involuntary manslaughter. If so, the jury would not be able to properly consider the impact of the reduced levels of culpability in considering the relevance of the evidence of his intoxication to culpability and penalty. That evidence would be relevant at the penalty phase, he argues, notwithstanding its irrelevance at the guilt phase in light of the felony-murder finding.

We agree that the evidence was relevant. We do not agree that any instructional error misled the jury as to that relevance, however. As we noted above, it is clear that the jury was aware that intent to kill was an element of attempted murder and rejected the evidence that defendant's intoxication negated the existence of that intent. And, as noted earlier, the jury was instructed that it should take into account the evidence of both

defendant's abnormal mental state and his drug-induced intoxication. The jury rejected defendant's attempt to establish reduced culpability on that basis when it returned the guilt verdict.

Defendant also claims that the jury might not have been aware that his intoxication was relevant in determining whether he committed larceny or auto theft rather than robbery. He argues, in support of his claim that inadequate instruction prejudiced him in this regard, that he "maintained that he did not intend to rob Dykstra or Wolbert."

We reject his claim that the instructions were inadequate in this regard. The jury was instructed that robbery was a specific intent crime, that the specific intent to commit robbery had to be proven beyond a reasonable doubt, and that defendant's intoxication should be considered in determining if he had the requisite specific intent. Instructions on larceny were given, and the jury was told that if it was not satisfied that the defendant was guilty of the charged offense it could convict on any lesser

included offense. The instructions were adequate. (People v. Jones (1991) 53 Cal.3d 1115, 1145.)

We note also that defendant does not accurately describe his testimony. While he testified that at the time the car pulled over he intended only to urinate, he also testified that his intent was to take the victims farther up the canyon before taking their money. Defendant refused to characterize his intent as an intent to "rob," but his own description of the plan admitted that intent. At one point during cross-examination when the prosecutor asked about his choice of words, defendant testified: "We didn't intend to rob them, just to get them to -- rip them off of their money, get them to give it to us and take it." Asked what his intent was when the gun was used, he stated: "Same intentions, take their money."

We see no possibility that the jury was unaware that drug- or alcohol-induced intoxication could afford a basis for a guilt phase verdict of lesser offenses, failed to understand that this reflected society's recognition of differing degrees of legal

culpability, or failed to recognize that drug and alcohol-induced intoxication could be considered in assessing defendant's culpability at the penalty phase.

3. Standard of Proof.

Defendant claims that the court erred in refusing to instruct the jury that before it could impose the death penalty it had to find beyond a reasonable doubt that aggravating factors outweighed mitigating and that death was the appropriate penalty. We have repeatedly rejected the argument that the reasonable doubt standard, one required when determining guilt and making factual determinations, is appropriate to assessing the penalty to be imposed in a capital case. (See, e.g., People v. Bacigalupo (1991) 1 Cal.4th 103, 146; People v. Gordon (1990) 50 Cal.3d 1223, 1273-1274; People v. Jennings (1988) 46 Cal.3d 963, 992.)

B. Evidence of Prior Criminal Conduct.

1. Kathy Cusack.

Defendant first claims that evidence of his attack on Kathy Cusack should have been excluded as more prejudicial than probative (Evid. Code, § 352), and as improper rebuttal. He also complains that introduction of evidence of criminal acts of which a defendant has not been convicted denies a fair trial since determination of guilt is made by the same jury that has already returned a verdict of guilty on the charges for which the defendant is on trial. Neither claim has merit.

Evidence of prior assaultive conduct is expressly made admissible as a statutory aggravating factor by section 190.3, factor (b) -- "The presence . . . of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." As such it is a matter which the state believes to be particularly relevant to the penalty decision. (People v. Jennings, supra, 46 Cal.3d 963, 988; People v. Melton (1988) 44 Cal.3d 713, 770.) Therefore, while we recognize that the court has authority under Evidence Code section 352 to control the manner

in which evidence of past criminal conduct is offered, it has no discretion to exclude all evidence related to a statutory sentencing factor. (People v. Douglas (1990) 50 Cal.3d 468, 531; People v. Karis (1988) 46 Cal.3d 612, 641, fn. 21.)[36] The evidence was properly offered in rebuttal to defendant's attempt to persuade the jury that his violent acts were uncharacteristic and that he normally treated people with concern and respect. (People v. Rodriguez (1986) 42 Cal.3d 730, 791-792.)

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36. Defendant's reliance on People v. Harvey (1979) 25 Cal.3d 754, for his further claim that the plea bargain in which he pleaded guilty to the assault with a deadly weapon on Scofield precludes consideration of the attack on Cusack in this proceeding is misplaced. We held there that it would be unfair to permit a court to consider the facts underlying counts dismissed in a plea bargain in sentencing for the charge to which the defendant had pleaded guilty. We reasoned that absent a contrary agreement it was implicit in such a bargain "that defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, the dismissed count." (Id., at p. 758.)

The sentence to which we referred, however, was the sentence then being imposed. Nothing in Harvey, supra, 25 Cal.3d 754, precludes consideration of all incidents of assaultive conduct in sentencing for subsequent offenses, including capital sentencing, whether or not the defendant has been charged with those offenses, or had them dismissed in a bargained-for disposition of other charges. (People v. Robertson, supra, 48 Cal.3d 18, 47; People v. Melton supra, 44 Cal.3d 713, 755.)

Defendant asserts that the mitigating evidence he offered to show that he was good to members of his family was limited to evidence of his conduct when he was not under the influence of drugs and that it was not offered as evidence that he was nonviolent or to demonstrate a character trait of being a nonviolent person. On that basis he argues that evidence of his prior assaultive conduct while under the influence of drugs was not proper rebuttal. We are not persuaded.

The prosecution may rebut mitigating character evidence with evidence related to the character trait raised by defendant. (People v. Mickle (1991) 54 Cal.3d 140, 191; People v. Rodriguez, supra, 42 Cal.3d 730, 792, fn. 24.) A number of witnesses testified to defendant's kind, loving, and compassionate behavior. A capital defendant who offers, as mitigating evidence relevant to whether he should live or die,[37] evidence that he is a kind and considerate person may not

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37. Defendant's reliance on Evidence Code section 1102 is misplaced. That section permits the prosecution to introduce evidence of a trait of character "in the form of an opinion or evidence of his reputation" in order to rebut evidence

restrict the scope of evidence offered to rebut that inference by arguing that he intended only to demonstrate that he was kind and considerate under limited circumstances or to particular people. Evidence that defendant violently assaulted a pregnant woman who was in bed and stabbed her several times even after being told of her condition was relevant and proper rebuttal to the evidence that he was a kind and considerate person.

Defendant also makes a wide-ranging constitutional attack on introduction of evidence of unadjudicated criminal conduct, asserting without elaboration, that he was denied due process and equal protection, that his right against self-incrimination was violated, that the presumption of innocence was infringed, that the right to confrontation was denied, and that the right to a

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the defendant has offered to prove the defendant's "conduct in conformity with such character or trait of character."

The relevance of evidence of character or a character trait to the penalty determination in a capital case is not whether the defendant acted in conformity with a character trait, but whether the defendant's character or character trait should be considered a mitigating factor. Therefore, whether prosecution evidence is proper rebuttal must be determined in the peculiar circumstances of a penalty trial, not under Evidence Code section 1102.

reliable penalty determination was affected. He concedes that a due process based claim was considered and rejected in People v. Balderas (1985) 41 Cal.3d 144, 204-205, in which we found no support in decisions of the United States Supreme Court for the suggestion that due process requires impanelment of a separate jury to determine the penalty in a capital case. We decline his invitation to reconsider our conclusion that admission of unadjudicated criminal acts as aggravating factors is constitutionally permissible.

We also reject defendant's claim that admission of evidence of the attack on Cusack was error either because the prosecution failed to give notice, or because defendant was denied a continuance to enable him to prepare to defend against that evidence. The notice of aggravating evidence given by the People pursuant to section 190.3 prior to trial did not include this evidence, but section 190.3 expressly excludes rebuttal evidence from the notice requirement.

Defendant did request a continuance in order to find witnesses (other than William Scofield) "who would testify as to what really occurred that evening" and in order to prepare for cross-examination of Cusack. He did not name the potential witnesses, however, and the prosecution's abortive effort to introduce Cusack's testimony earlier should have alerted counsel to the probability that she would be called as a rebuttal witness. Counsel was on notice that Scofield would be a witness, and any investigation of the 1978 events in which Scofield was attacked would have revealed "what really occurred that evening."

Notice that evidence will be presented regarding a specific prior crime or crimes should alert counsel that evidence of all crimes committed as part of the same course of conduct may be offered, and, therefore, substantially complies with the notice requirement of section 190.3. (People v. Cooper, supra, 53 Cal.3d 771, 842.) Finally, the court did order that all police reports related to the 1978 incident, those about Scofield and Cusack, be delivered to counsel immediately, and she was not

called until the following day. Under the circumstances, there was no abuse of discretion in denying the request for a continuance. The ruling is one that is committed to the sound discretion of the trial court. (People v. Ainsworth (1988) 45 Cal.3d 984.)

Unlike the situation in Lankford v. Idaho (1991) ___U.S. ___ [111 S.Ct. 1723] on which defendant relies, ample notice that the state would seek the death penalty was given from the outset of this prosecution. Special circumstances were charged and the People gave notice of the aggravating evidence it intended to offer at the penalty phase. Defendant was not denied notice of the issue to be resolved at the penalty phase of the trial.

Nor does introduction of evidence of unadjudicated offenses threaten imposition of the death penalty on the basis of materially inaccurate evidence such as that considered by the jury in Johnson v. Mississippi (1988) 486 U.S. 578. There the only evidence offered to support an aggravating factor of prior conviction of a felony involving use or threat of violence was a

copy of a prior commitment to prison. The judgment reflected in that commitment was subsequently set aside. The Supreme Court held that consideration of the invalid conviction was clearly prejudicial since no other evidence of aggravating circumstances was available, and created a risk that the sentence was imposed arbitrarily. Here there was no comparable risk. Evidence of the facts underlying the prosecution's claim that defendant had committed a prior violent crime was offered, and the jury was instructed that it could not consider that evidence unless defendant's commission of the acts was proved beyond a reasonable doubt.

2. William Scofield.

Relying on People v. Jackson (1985) 37 Cal.3d 826, and People v. Crowson (1983) 33 Cal.3d 623, defendant claims that it was error to permit Scofield to testify regarding the details of defendant's 1978 assault on him. Evidence of a prior felony conviction must be limited, he claims, to evidence of the minimal, or least adjudicated, elements of the prior offense to

avoid the double jeopardy and speedy trial implications of litigating the truth of the past offense. Defendant concedes that no objection was made to the evidence. Moreover, we have rejected similar claims (see People v. Karis, supra, 46 Cal.3d 612, 640; People v. Melton, supra, 44 Cal.3d 713, 755-756; People v. Gates (1987) 43 Cal.3d 1168, 1203), and are not persuaded that these decisions should be reconsidered. The presentation of evidence of past criminal conduct at a sentencing hearing does not place the defendant in jeopardy with respect to the past offenses. He is not on trial for the past offense, is not subject to conviction or punishment for the past offense, and may not claim either speedy trial or double jeopardy protection against introduction of such evidence. (People v. Melton, supra, 44 Cal.3d 713, 756, fn. 17.)

3. Evidence of Juvenile and Noncriminal Conduct.

The court instructed the jury to consider all of the evidence received at any phase of the trial. Defendant claims that as a result the jury was improperly permitted to consider evidence of

nonviolent and juvenile offenses that otherwise would have been inadmissible at the penalty phase.

Not only did defendant fail to request a limiting instruction, but his assumption that violent juvenile conduct was inadmissible is unwarranted. Section 190.3 permits consideration of "other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence." Evidence of violent juvenile conduct is admissible under that section. (People v. Burton (1989) 48 Cal.3d 843, 862; People v. Luck (1988) 45 Cal.3d 259, 295.)

Evidence of nonviolent criminal activity that did not result in a felony conviction is, as defendant claims, inadmissible as an aggravating factor. (People v. Burton, supra, 48 Cal.3d 843, 862.) Here, however, the evidence that defendant now claims should not have been considered was evidence that he himself had introduced in support of his effort to establish that his criminal conduct was attributable to his use of drugs and that he

was otherwise a loving, caring, nonviolent and law-abiding person. The court did limit consideration of the evidence by instructing the jury to consider the statutory factors (§ 190.3) in determining the penalty. Having introduced the evidence himself, defendant may not now complain that the jury might have concluded that the factor to which it was relevant was aggravating rather than mitigating. (People v. Williams, supra, 44 Cal.3d 883, 957.)[38]

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38. The prosecutor did refer to the evidence of defendant's prior criminal conduct, stating that it reflected a person "with a fairly aggravated background," but he did so in arguing that the testimony by members of defendant's family did not accurately portray his character, and that the jury was not being asked to impose the death sentence on a person who had only "one bad day in his 25 years."In his subsequent discussion of the factors the jury was to consider he did not argue that this evidence was aggravating under any of the factors.

One reference to defendant's juvenile record was in the prosecutor's discussion of section 190.3, factor (i) -- "The age of the defendant at the time of the crime"-- and there he argued only that defendant's age "doesn't help him a bit. He's 25, 26. He's been an adult. He's actually been convicted of both juvenile and adult offenses. He's been sent to state prison as an adult before. His age doesn't help him here."

In another reference, while discussing the expanded sentence 190.3, factor (k) instruction that permitted the jury to consider any evidence offered by defendant including pity or

C. Response to Jury Inquiries.

During the second day of deliberation, the jury sent questions to the judge asking:

"1. Can you give us a more explicit legal definition of the phrase 'extreme duress'?"

and

"2. Can you give us a more explicit legal definition of the phrase 'moral justification'?"

The court responded in writing, signed with "O.K." by both counsel, stating:

"The definition of the terms of which you inquire are [sic] self evident. These are not especially technical terms under the

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sympathy for defendant, the prosecutor asked the jury to "remember what kind of a person he has shown himself to be during his life, both in his late years as a juvenile and as an adult. Don't waste your pity on someone who doesn't deserve it."

At no time did the prosecutor argue that defendant's juvenile record should be considered an aggravating factor. The argument was carefully tailored to discount the evidence as mitigating.

law and you are to construe these phrases in their common meaning. In other words, they mean what they say."

Notwithstanding his attorney's approval of the response, defendant claims that it was inadequate since the response did not further define the terms and did not correct a misunderstanding which he claims was implicit in the inquiry as to the power of the jury to consider any factor calling for a sentence less than death even if not specifically enumerated in the sentence. Even now, however, defendant does not suggest what more appropriate "clarification" might have been given. (See People v. Gonzales (1990) 51 Cal.3d 1179, 1227.)

The jury inquiry related to the court's instruction, in the language of section 190.3, advising the jury of the aggravating and mitigating factors which the jury should consider in determining the appropriate penalty. Section 190.3, factor (f) permits consideration of "[w]hether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his

conduct." Section 190.3, factor (g) permits consideration of "[w]hether or not defendant acted under extreme duress or under the substantial domination of another person."

Assuming the issue was preserved for appeal, there was no error. "Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972)." (Maynard v. Cartwright (1988) 486 U.S. 356, 361-362.) The statutory factor in Maynard v. Cartwright, supra, was that the murder be "especially heinous, atrocious, or cruel." Those adjectives failed to give the jury adequate guidance since they suggested only that the individual juror was to determine if the murder was more than "just heinous," and an

ordinary person could believe that all unjustified, intentional taking of life was "especially heinous." (486 U.S. at p. 364.)

Factors (f) and (g) of section 190.3, by contrast, are not "aggravating circumstances" comparable to those under consideration in Maynard v. Cartwright, supra, 486 U.S. 356, or Lewis v. Jeffers (1990) ___ U.S. ___ [110 S.Ct. 3092], on which defendant also relies. Neither is a "special circumstance" whose function in this state is to channel jury discretion by narrowing the class of defendants who are eligible for the death penalty. Under the California death penalty law an "aggravating factor" identifies a matter which the jury may consider in deciding whether a defendant who has already been found eligible for the death penalty should receive that punishment. "[W]ith respect to the process of sentencing from among that class those defendants who will actually be sentenced to death, '[w]hat is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime. [Citation.] It is not simply a finding of facts which

resolves the penalty decision, "'but . . . the jury's moral assessment of those facts as they reflect on whether the defendant should be put to death . . . .'" (People v. Brown, supra, 40 Cal.3d 512, 540, italics omitted.) Consideration of statutory aggravating and mitigating factors as part of the jury's normative function of determining the appropriate punishment is, therefore, distinguishable from the factual determination made when the jury finds that a special circumstance allegation is true.

Nonetheless, the jury must "be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face." (Walton v. Arizona (1990) __U.S.__ [110 S.Ct. 3047, 3057].) This obligation undoubtedly extends to aggravating factors identified in section 190.3. Factors (f) and (g), however, are mitigating factors which call to the attention of the jury only two of an unlimited number of matters which the jury may consider as weighing against

imposition of the death penalty. Moreover, these factors do not describe the relevant consideration solely in terms of vague and pejorative adjectives as does subdivision (a)(14) of section 190.2, the California equivalent of the "heinous, atrocial, and cruel" aggravating factor considered by the Supreme Court in Maynard v. Cartwright, supra, 486 U.S. 356. This court held subdivision (a)(14) invalid as an unconstitutionally vague special circumstance in People v. Superior Court (Engert) (1982) 31 Cal.3d 797, noting that none of the terms met "the standards of precision and certainty required of statutes which render persons eligible for punishment, either as elements of a charged crime or as a charged special circumstance." (Id., at p. 802.)

Section 190.3, factor (f) asks the jury to consider whether the defendant believed his act was morally justified, while factor (g) is predicated on duress, a noun whose meaning is generally understood as force or compulsion. "Duress" is modified by the word "extreme," which has a meaning that is generally understood as describing the farthest end or degree of a range of

possibilities. There is no comparable vagueness, and the defendant is further protected against possible arbitrary sentencing in that any mitigating evidence he offers must be considered by the jury.

We do not join defendant's assumption that the jury inquiry reflected confusion as to whether it could consider the evidence that defendant fired the gun in response to Hefner's command. It is highly improbable that a jury would consider that to be evidence of duress of any sort, and the jury had been expressly instructed that any factor offered in mitigation could be considered.

Inasmuch as no substantial evidence of duress, extreme or otherwise, and no evidence suggesting that defendant believed he was morally justified was offered, defendant suffered no prejudice from the failure of the court to respond differently.

D. Double Counting of Aggravating Factors.

Defendant complains that the court's instructions, tracking the statutory language of factors (a), (b), and (c) of section

190.3,[39] without further clarification, permitted the jury to consider some evidence under more than one of the factors, thus artificially inflating that evidence.

The "prior convictions" encompassed in factor (c) do not include the offenses of which the defendant had been convicted in the current proceeding (People v. Balderas, supra, 41 Cal.3d 144, 201) and the circumstances of the current offenses which reflect violence and/or threats of violence are to be considered only under factor (a). Factor (b) relates to other unadjudicated criminal conduct. (People v. Miranda (1987) 44 Cal.3d 57, 105-106.)

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39. The part of the instruction of which defendant complains advised the jury that in determining the penalty it should consider:

"(a) the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.

"(b) the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence, or the expressed or implied threat to use force or violence.

"(c) the presence or absence of any prior felony conviction."

The jury was not told that it should or could "double count" or "triple count" evidence under these factors, however, and the court is not under a duty to instruct sua sponte that such consideration would be improper. (People v. Guzman (1988) 45 Cal.3d 915, 966.) Since the prosecutor did not mislead the jury, or suggest that the evidence be considered more damning because it related to more than one factor,[40] we do not agree that it is likely the jury overemphasized its importance.

E. Age Factor.

Defendant urges the court to reconsider our conclusion in People v. Lucky, supra, 45 Cal.3d 259, 302, that age-related

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40. In his penalty phase argument the prosecutor carefully and properly segregated the evidence. He told the jury that the first factor "deals specifically with the crime that you've heard about and convicted this man of, and the special circumstances involved." He then reminded the jury of the evidence concerning the shooting of Dykstra and Wolbert in the course of a robbery.

Addressing factor (b), he told the jury that the factors involved prior violence, and reminded the jury it had heard evidence about the attack on Cusack. He then turned to factor (c), recalling that defendant had admitted that he had pled guilty to a felony, and discussing the evidence relevant to the 1978 attack on Scofield.

matters suggested by the evidence and relevant to the penalty decision are not limited to consideration as mitigating evidence under factor (i) of section 190.3. He argues that, as defined by the court in Lucky, the age factor fails to offer guidance to the jury and invites arbitrary and capricious sentencing. This, he suggests, renders factor (i) unconstitutionally vague, and its use a violation of the Eighth and Fourteenth Amendments.

Lucky, supra, 45 Cal.3d 259, and People v. Rodriguez, supra, 42 Cal.3d 730, 789, make it clear, however, that chronological age alone may not be deemed aggravating. As long as neither the prosecutor in argument, nor the court in its instructions, suggests that age is to be considered aggravating, the jurors may determine the relevance, if any, of the defendant's age to the appropriate penalty. (People v. Hernandez (1988) 47 Cal.3d 315, 362.) Permitting the jury to make this decision as part of what we have described as the "essentially normative task" (People v. Allen (1986) 42 Cal.3d 1222, 1287) of determining the appropriate penalty after weighing the evidence

and applying its own moral standard, contravenes no constitutional principle.

F. Proportionality.

Defendant asks the court to undertake both intracase and intercase proportionality review, arguing that the death sentence imposed on him is arbitrary, discriminatory, and disproportionate under the due process, equal protection, and cruel and unusual punishment clauses of the United States and California Constitutions. He bases his claim on the evidence of his chemical dependency, the fact that Hefner did not receive the death penalty even though he was a full participant in the events, and his conviction of only one murder with no prior arrests for murder.

None of these considerations warrants reversal of the penalty under any of the theories proposed by defendant. "Unless the state's capital punishment system is shown by the defendant to operate in an arbitrary and capricious manner, the fact that such defendant has been sentenced to death and others

who may be similarly situated have not does not establish disproportionality violative of constitutional principles. (McCleskey v. Kemp (1987) 481 U.S. 279, 306-312)." (People v. McLain (1988) 46 Cal.3d 97, 121.)

The conclusion of the jury that the intentional killing of Dykstra during a $70 robbery in which an attempt was made to kill a second victim in order to prevent identification, by a person who had in the past committed other drug-related violent assaults, warranted imposition of the death penalty is not aberrant and does not demonstrate arbitrary or capricious sentencing. The penalty cannot be deemed disproportionate to the offense.

G. Motion for Modification (§ 190.4).

Defendant argues that the trial court did not properly rule on his motion for modification of the verdict of death. He claims that the court's denial of the motion was arbitrary and erroneous, took into account improper considerations, and failed to

recognize mitigating inferences, all in violation of his rights under the Sixth and Eighth Amendments.

The basis for these claims is an assertion that the court considered and referred to information contained in the probation report prior to ruling on the motion, and failed to refer to evidence that might have been considered mitigating.

A judge should not consider the probation officer's report prior to ruling on a modification motion. In making that ruling the judge is limited to consideration of the evidence that was before the penalty jury. (People v. Gonzalez, supra, 51 Cal.3d 1179, 1238.) While the recitals of the judge state only that the report had been reviewed prior to "sentencing," that statement was made at the hearing in which the motion for modification was denied. The record supports defendant's assumption that the judge had already reviewed the probation report when he denied the motion therefor.

Nonetheless the judge set out in great detail the evidence on which he relied for his conclusion that the aggravating factors

"overwhelmingly" outweighed the mitigating. No mention of evidence other than that before the jury, and thus properly before the court, is made in the court's statement. The judge stated expressly that he had considered all of the evidence that had been presented to the jury in making his determination of the proper penalty, and that this included the "totality of the penalty phase evidence." We must assume, therefore, that the judge considered only evidence that had been before the jury in making his ruling. (People v. Sully, supra, 53 Cal.3d 1195, 1250; People v. Douglas, supra, 50 Cal.3d 468, 539-540.) It is also clear that he was aware of, understood why the jury might have discounted, and did himself consider all of the potentially mitigating evidence.

H. Validity of Death Penalty Law.

Defendant asks the court to reevaluate the validity of the 1978 death penalty law, arguing that the constitutional requirements of a law which narrows the class of murderers eligible for the death penalty while avoiding arbitrary and

capricious imposition are not satisfied. He concedes that the court has held that the narrowing function is satisfied notwithstanding the unavailability of intercase proportionality review, but argues that the breadth of prosecutorial discretion in exercising the charging function itself leads to arbitrary and capricious implementation of the law.

This argument is not supported by either empirical evidence or authority which suggests that the manner in which prosecutors exercise their discretion in seeking the death penalty in murder prosecutions in which special circumstances appear to be present is arbitrary. (People v. Keenan (1988) 46 Cal.3d 478, 506.) It requires nothing more than a review of the facts of other cases recently before this court to refute defendant's speculation that prosecutors in other heavily populated counties such as Los Angeles County would not seek the death penalty for murder committed in comparable circumstances. (See, e.g., People v. Fuentes (1991) 54 Cal.3d 707; People v. Duncan (1991) 53 Cal.3d 955; People v. Lewis, supra, 50 Cal.3d 262.)

Defendant also asks that we reconsider prior decisions "(see People v. Sully, supra, 53 Cal.3d 1195, 1250-1251, and cases cited) upholding the 1978 death penalty law against challenges attacking the omission of requirements for written findings on the presence of aggravating factors; proof beyond a reasonable doubt of those factors; jury unanimity on aggravating factors; agreement beyond a reasonable doubt that aggravating outweigh mitigating factors, and that death is the appropriate penalty; additional procedures for appellate review of the sentencing decision; or a presumption in favor of life without parole.[41/] We decline the invitation.

VII

PROSECUTORIAL MISCONDUCT

Acknowledging that no objections or requests for admonition were made on that basis, defendant claims that instances of prosecutorial misconduct occurring throughout the

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41. Counsel acknowledges our rejection of these claims in prior cases and explains that they are presented here in part in order to ensure preservation for federal review.

trial were so serious and pervasive that the trial court had a sua sponte duty which the judge failed to assume to correct the abuse. He claims that the misconduct was so pervasive that he was denied a fair trial and that reversal is therefore required notwithstanding the failure to properly preserve the issue for appeal.

A defendant who does not object and seek an admonition to disregard improper statements or argument by the prosecutor is deemed to have waived any error unless the harm caused could not have been corrected by appropriate instructions. (People v. Bell, supra, 49 Cal.3d 502, 547; People v. Green, supra, 27 Cal.3d 1, 34.) Because we do not expect the trial court to recognize and correct all possible or arguable misconduct on its own motion (People v. Bell, supra, 49 Cal.3d 502, 542; People v. Adcox (1988) 47 Cal.3d 207, 261; People v. Poggi (1988) 45 Cal.3d 306, 335-336), defendant bears the responsibility to seek an admonition if he believes the prosecutor has overstepped the bounds of proper comment, argument, or inquiry.

Defendant claims the prosecutor acted improperly in a variety of ways -- by comments designed to appeal to the fears and prejudices of the jurors, by casting aspersions on the defense case with accusations of perjury and deceit, and by inviting consideration of irrelevant issues and facts not supported by the evidence. Much of the conduct on which he relies for these claims cannot reasonably be characterized in that manner, however.

Defendant complains in particular that the prosecutor attempted to impeach his credibility by asking if defendant had changed his appearance because he was to appear before the jury. This, he suggests, was an appeal to passion and prejudice, but People v. Kirkes (1952) 39 Cal.2d 719, 724, on which he relies, hardly supports that argument. In Kirkes the prosecutor, stating facts not in evidence, had asserted personal knowledge of the defendant's guilt, implied he would not have prosecuted had he not believed in the defendant's guilt, and pictured the defendant as a person who would kill again to cover his crime

and prevent witnesses from testifying. While we may question the relevance of defendant's possibly improved appearance to assessing his veracity, the misconduct, if any, in the line of questioning could easily have been cured by an admonition had an objection been made.[42]

Defendant next complains that rather than challenging the qualifications of defendant's expert, Dr. Broussard, the prosecutor attempted to denigrate the value of the results of tests performed on defendant by referring to some as "little squiggles"

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42. Counsel did object on relevancy grounds to a question asking if defendant had "any particular reason" for having cut his hair 10 months before trial, and when defendant answered "no" to the question asking if he cut his hair because he was to appear before a jury, counsel objected to a follow-up inquiry: "It is totally coincidental?"

that gave some insight into defendant's personality,[43] and asking with regard to the Rorschach test that the expert "tell the jury what it was about any of those ink blots and his responses that cause you to go back 25 years in his life and say he had a problem with his mother." The prosecutor also asserted in cross-examining the expert that "anybody can call themselves a forensic psychologist, right," and asked if "the problem you have with this crime [is] the fact that he was apprehended so easily."

In further cross-examination the prosecutor questioned Dr. Broussard about "the Rosenhan" study, with which the expert

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43. The "squiggles" reference was to markings made by the subject of a Bender Visual Motor Gestalt test. Dr. Broussard had testified on direct that his opinion was based in part on his administration of that test to defendant. A copy of his report was being used on cross-examination. He had explained that the test involved showing the subject drawings or designs on paper, and asking the subject to copy what he had been shown on a sheet of paper. The prosecutor then characterized what was written as "those little squiggles on that paper."

Defendant offers no basis on which to conclude that this term was anything other than descriptive of the marks in question. Asked later on redirect examination whether the marks would look like squiggles to persons not versed in psychology, Dr. Broussard agreed that they would "unless you're trained in interpreting."

was not acquainted, asking questions that were assertions of fact or conclusions reached in that study, the import of which was that psychiatrists are unable to accurately diagnose schizophrenia and paranoia. The study itself was not introduced.

Referring to a similar attempt to impeach an expert on the basis of the same study, the Court of Appeal held that overruling an objection to the questioning was patent error. "It consists mainly in the prosecutor's having insinuated by his questions that half of all mental illness is feigned, and that the 'test'--whatever it is or may be--was--again in the prosecutor's opinion--settled and irrefutable. In fact, all of these assumptions were and are extremely dubious. Further, it is error to permit the use of professional studies not relied upon by an expert in the formulation of his opinion. (Evid. Code, § 721, subd. (b).) To allow their use would be to circumvent the hearsay rule." (People v. Criscione (1981) 125 Cal.App.3d 275, 286, fn. omitted.)

We agree that the manner in which the prosecutor cross-examined Dr. Broussard was improper in these instances. The misconduct here was more egregious than that considered by the Court of Appeal in Criscione, supra, 125 Cal.App.3d 275, because the expert in that case was familiar with the Rosenhan study. It is proper to question an expert about matter on which the expert bases his or her opinion and on the reasons for that opinion. A party attacking the credibility of the expert may bring to the jury's attention material that is relevant to the issue of which the expert was unaware (People v. Bell, supra, 49 Cal.3d 502, 532), but that party may not by its questions testify regarding the content of that material.

The questions and statements identified by defendant as misconduct make up only a small part of the cross-examination of the witness, one which is reflected in more than 100 pages of reporter's transcript. The complete examination of the witness covered 175 pages of transcript. Proper questions elicited a concession by the expert that there was a very good possibility

that if 50 psychologists reviewed the same test results they would not be unanimous in their opinions. Clearly, an admonition to the prosecutor and to the jury would have cured any prejudice from the improper conduct.[44/]

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44. Defendant also cites as misconduct the prosecutor's reference to Dr. Broussard as a "prostitute" in penalty phase argument. Assuming that this characterization was not mere hyperbole or exaggeration, and exceeded the bounds of permissible argument, however, it was not so potentially prejudicial that a prompt objection and admonition could not have averted any such prejudice. The failure to object precludes consideration of the claim here. (See People v. Carrera (1989) 49 Cal.3d 291, 320.)

We see no misconduct in that part of the prosecutor's penalty phase argument in which, addressing inconsistencies between defendant's extrajudicial statements and his testimony at trial, the prosecutor accused defendant of lying. Comment based on a reasonable inference drawn from the evidence is not improper even when the inference is that a wit ness has lied.[45/]

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45. One such comment related to defendant's attempt to characterize his conduct in the Scofield incident as self-defense. Another was directed to defendant's denial that Cusack had been present or had been attacked.

Both anticipated the prosecutor's exhortation to the jury to disregard anything defendant said because his testimony was unworthy of any credibility. The argument was founded on the evidence and inferences reasonably drawn therefrom. It was not improper.

Similarly, we cannot accept defendant's characterization of the prosecutor's reference to evidence which the trial court had admitted as "misconduct," an argument based on defendant's appellate claim that the trial court erred in permitting the jury to consider evidence of his misdemeanor, juvenile, and nonviolent offenses at the penalty phase. We have rejected defendant's argument that this evidence was erroneously admitted or considered.

The suggestion that argument based on evidence that has been admitted is misconduct would fail even were we to conclude that the admission of the evidence was error. Regardless of whether an appellate court may later conclude that a piece of evidence was erroneously admitted, argument directed to the evidence does not become misconduct by hindsight. Such

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This is true also of the comments made in prosecutor's rebuttal argument suggesting that because the defense lacked substance the penalty phase argument followed the technique of attempting to distract, pounding the table and making smoke. The penalty phase argument by defendant's counsel was a rambling discourse, not tied to particular evidence. The prosecutor's description was not inaccurate.

references may be considered in determining the prejudicial effect of the error in admitting evidence, but are not misconduct.

Defendant also cites as misconduct the prosecutor's statement in his penalty phase argument that Hefner had never been arrested or convicted. The statement was made in the context of assessing whether mitigation should be found under section 190.3, factor (g) on the basis of duress by Hefner. The prosecutor was responding to defendant's attempt to shift principal responsibility for the robbery-murder to Hefner. In argument the prosecutor stated to the jury that "you have a picture of [Hefner]. No prior record; never been arrested; never been convicted; 18 years old."

This was not, as defendant argues, an improper means of putting before the jury damaging facts that were not in evidence. Defendant himself had testified that as far as he knew Hefner had not been to prison or arrested for any crimes of violence. The prosecutor misspoke when he said that Hefner had never been arrested. Defendant had testified that Hefner told him he had

been arrested. Again, however, had defendant objected this discrepancy could easily have been clarified by the court.

Nor was it misconduct for the prosecutor to anticipate the instructions on lesser included offenses which the court would give by arguing that those instructions were required by law and did not indicate that the court necessarily believed that the instructions applied. A prosecutor is entitled to argue that the evidence shows beyond a reasonable doubt commission of the charged offenses, and that it does not support only a lesser included offense. We see no impropriety in this context to a statement that the fact that instructions are given on lesser offenses should not be understood by the jury as reflecting the view of the court as to the sufficiency of the evidence to support conviction of the charged offense. That argument is fully consistent with the standard instructions which the judge gave the jury, advising the jury that he did not intend by anything he said to suggest how the jury should find on any question; and that the jury was to determine whether some of the instructions

were applicable; and that "you must not conclude from the fact that an instruction has been given that the court is expressing any opinion as to the facts."

The remaining citations of misconduct fall into similar categories -- attacking hyperbole in argument, or possibly questionable comments that were sufficiently innocuous that an admonition could easily have cured any harm.[46] Neither these comments, nor any of those discussed above that might arguably have been misconduct, were such as to deny the defendant a fair

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46. The claimed misconduct was:

1. The prosecutor "vouched" for the testimony of Michael Wolbert, saying he had told Wolbert to tell the truth and do his best, and "that's what he did."

2. The prosecutor argued the jury to consider that defendant might have avoided capture, reminded the jury that the victims' families were present, and stated that if defendant were not convicted on all counts, it would be an insult to Wolbert's struggle to live.

3. The prosecutor asked defendant's girlfriend if she was "gonna wait for him."

4. The prosecutor suggested that defendant may have escaped from custody more than the three times of which a witness, defendant's father, was aware.

5. The prosecutor stated, with regard to Scofield's testimony, based on the prosecutor's own experience, "you can't expect to have angels for witnesses."

trial, divert the jury from its proper role, or invite an irrational, purely subjective response. (See People v. Lewis, supra, 50 Cal.3d 262, 284.)

VIII

JUDGMENT

The judgment is affirmed in its entirety.

BAXTER, J.

WE CONCUR:

LUCAS, C.J.
PANELLI, J.
KENNARD, J.
ARABIAN, J.
GEORGE, J.

COPY

PEOPLE v. VISCIOTTI

S004597 [Crim. 23385]

DISSENTING OPINION BY MOSK, J.

I dissent.

Ex proprio motu, I would raise -- and resolve in the affirmative -- the question whether Roger James Agajanian, who served as counsel in the trial court, provided defendant with ineffective assistance in violation of his rights under the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution.[1/]

Agajanian's deficiencies as trial counsel were pervasive and serious. The point is established by the record. It is confirmed by the majority opinion's practically countless references to waiver. Examples of Agajanian's failings are hard to select, each competing with the rest for egregiousness. By way of

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1. Agajanian also served as counsel in this court from the commencement of the appeal in 1983 until his suspension from the practice of law in 1990. Shortly thereafter, present counsel was appointed in his place.

illustration only, I note the following. At the guilt phase, Agajanian relied on the defense of diminished capacity. Much to the surprise he expressed at trial, this defense had previously been abolished and rendered a nullity for all relevant purposes. At the penalty phase, Agajanian presented a summation asking the jury to spare defendant's life. The argument he made in support was worthless. The majority is generous in describing the remarks as "a rambling discourse, not tied to particular evidence." (Maj. opn., ante, at p.___ fn. 45 [typed maj. opn. at p. 98, fn. 45].)[2/]

Agajanian's deficiencies at trial compel this conclusion: his failings resulted in a breakdown of the adversarial process at trial; that breakdown establishes a violation of defendant's federal and state constitutional right to the effective assistance of counsel; and that violation mandates reversal of the judgment

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2. Agajanian's deficiencies as appellate counsel were also pervasive and serious. Witness the fact that the sole act of any significance that he performed on behalf of defendant over the course of almost seven years of representation before this court was the filing of a single thirty-page brief raising only two insubstantial penalty claims.

even in the absence of a showing of specific prejudice. (See United States v. Cronic (1984) 466 U.S. 648, 653-662 [speaking of the federal constitutional guaranty only]; People v. Ledesma (1987) 43 Cal.3d 171, 242-245 (conc. opn. of Grodin, J.) [speaking of both the federal and state constitutional guaranties].)[3/]

"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." (Herring v. New York (1975) 422 U.S. 853, 862; accord, United States v. Cronic, supra, 466 U.S. at p. 655.) In other words, "The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness." (Polk County v. Dodson (1981) 454 U.S. 312, 318.) It follows that the system requires "meaningful adversarial testing." (United States v. Cronic, supra, 466 U.S. at p. 656.)

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3. Agajanian's deficiencies on appeal would have compelled the same conclusion had he not been suspended from the practice of law and been replaced by present counsel.

"When" -- as here -- "such testing is absent, the process breaks down and hence its result must be deemed unreliable as a matter of law." (People v. Bloom (1989) 48 Cal.3d 1194, 1237 (conc. & dis. opn. of Mosk, J.); see United States v. Cronic, supra, 466 U.S. at p. 659; see also Rose v. Clark (1986) 478 U.S. 570, 577-578 [to similar effect].)

For the foregoing reasons, I would reverse the judgment in its entirety.

MOSK, J.

PEOPLE v. JOHN LOUIS VISCIOTTI

S004597

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TRIAL COURT #: 50770

The information provided here is not intended to reflect that which will appear in official reports.

APPENDIX F

APPENDIX F

California Penal Code section 190.3

§ 190.3. Determination of death penalty or life imprisonment; evidence of aggravating and mitigating circumstances; considerations

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the express or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the

mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole. *(Added by § 8 of Initiative Measure approved Nov. 7, 1978.)*